Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 24 June 2021 [1]

Case C-709/20

CG
v
The Department for Communities in Northern Ireland

(Request for a preliminary ruling from the Appeal Tribunal for Northern Ireland (United Kingdom))

(Reference for a preliminary ruling – Freedom of movement for persons – Citizenship of the Union – Agreement on the withdrawal of the United Kingdom – Transition period – Article 18 TFEU – Non-discrimination on the ground of nationality – Directive 2004/38/EC – Article 24 – National right of residence – Social assistance – National provision excluding from a subsistence allowance economically inactive Union citizens with a national right of residence – Equal treatment)

I. Introduction

1. The request for a preliminary ruling concerns the interpretation of Article 18 TFEU.

2. The request has been made in proceedings between CG, a Netherlands and Croatian national, who has been resident in Northern Ireland (United Kingdom) since 2018, and the Department for Communities in Northern Ireland (United Kingdom), concerning the latter's refusal to grant her a subsistence allowance known as 'Universal Credit'.

3. The question referred to the Court concerns, in essence, the protection owed to a citizen of the European Union with respect to access to social assistance, in application of the principle of equal treatment, when the host Member State has granted her a right of residence, based on national law, in conditions more favourable than those provided for by Directive 2004/38/EC. [2]

4. This case thus provides the Court with the opportunity to clarify the relationship between Article 18 TFEU and Article 24 of that directive and the conditions in which the principle of equal treatment must be implemented when the national legislation excludes from access to social

[1] Original language: French.

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

benefits, which aim to grant their recipients the minimum means of existence, certain Union citizens because of the nature of their right of residence, when those benefits are guaranteed to nationals of the Member State concerned who are in the same situation of extreme poverty.

5. In this Opinion, I shall propose that the Court consider that the refusal of social assistance by a Member State to an economically inactive national of another Member State on the sole basis of his or her right of residence, conferred without conditions as to resources in application of a national provision, may constitute indirect discrimination on the ground of nationality, which it is for the referring court to ascertain, and that, in such a situation, that legislation goes beyond what is necessary to maintain the equilibrium of the social assistance system of the host Member State.

II. Legal framework

A. European Union law

1. The Agreement on the withdrawal of the United Kingdom

6. The sixth and eighth paragraphs of the preamble to the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, [3] approved by Decision (EU) 2020/135, [4] state:

'Recognising that it is necessary to provide reciprocal protection for Union citizens and for United Kingdom nationals, as well as their respective family members, where they have exercised free movement rights before a date set in this Agreement, and to ensure that their rights under this Agreement are enforceable and based on the principle of non-discrimination; recognising also that rights deriving from periods of social security insurance should be protected,

…

Considering that it is in the interest of both the Union and the United Kingdom to determine a transition or implementation period during which … Union law, including international agreements, should be applicable to and in the United Kingdom, and, as a general rule, with the same effect as regards the Member States, in order to avoid disruption in the period during which the agreement(s) on the future relationship will be negotiated,'

7. Article 2(a) and (c) of the Agreement on the withdrawal of the United Kingdom provides:

'For the purposes of this Agreement, the following definitions shall apply:

(a) "Union law" means:

[3] OJ 2020 L 29, p. 7; 'the Agreement on the withdrawal of the United Kingdom'.

[4] Council Decision of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1).

(i) the Treaty on European Union ("TEU"), the Treaty on the Functioning of the European Union ("TFEU") and the Treaty establishing the European Atomic Energy Community …, as amended or supplemented, as well as the Treaties of Accession and the Charter of Fundamental Rights of the European Union [("the Charter")], together referred to as "the Treaties";

(ii) the general principles of the Union's law;

(iii) the acts adopted by the institutions, bodies, offices or agencies of the Union;

…

(c) "Union citizen" means any person holding the nationality of a Member State.'

8. Part two of the Agreement on the withdrawal of the United Kingdom, entitled '*Citizens' rights*',[5] contains Articles 9 to 39.

9. Article 13(1) of that agreement states:

'Union citizens and United Kingdom nationals shall have the right to reside in the host State under the limitations and conditions as set out in Articles 21, 45 or 49 TFEU and in Article 6(1), points (a), (b) or (c) of Article 7(1), Article 7(3), Article 14, Article 16(1) or Article 17(1) of Directive [2004/38].'

10. Article 86(2) and (3) of that agreement provides:

'2. The Court of Justice of the European Union shall continue to have jurisdiction to give preliminary rulings on requests from courts and tribunals of the United Kingdom made before the end of the transition period.

3. For the purposes of this Chapter, proceedings shall be considered as having been brought before the Court of Justice of the European Union, and requests for preliminary rulings shall be considered as having been made, at the moment at which the document initiating the proceedings has been registered by the registry of the Court of Justice or the General Court, as the case may be.'

11. Article 89(1) of that agreement provides:

'Judgments and orders of the Court of Justice of the European Union handed down before the end of the transition period, as well as such judgments and orders handed down after the end of the transition period in proceedings referred to in Articles 86 and 87, shall have binding force in their entirety on and in the United Kingdom.'

12. Article 126 of the Agreement on the withdrawal of the United Kingdom, entitled 'Transition period', states:

'There shall be a transition or implementation period, which shall start on the date of entry into force of this Agreement and end on 31 December 2020.'

[5] Emphasis added.

13. Article 127 of that agreement provides, in paragraphs 1 and 3:

'1. Unless otherwise provided in this Agreement, Union law shall be applicable to and in the United Kingdom during the transition period.

…

3. During the transition period, the Union law applicable pursuant to paragraph 1 shall produce in respect of and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States, and shall be interpreted and applied in accordance with the same methods and general principles as those applicable within the Union.'

14. The Agreement on the withdrawal of the United Kingdom entered into force at midnight on 31 January 2020. [6]

2. Directive 2004/38

15. Recitals 10, 20 and 21 of Directive 2004/38 state:

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

…

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.

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

16. Under Article 1 of that directive:

'This Directive lays down:

(a) the conditions governing the exercise of the right of free movement and residence within the territory of the Member States by Union citizens and their family members;

[6] See the summary of the stages of the withdrawal of the United Kingdom available at the following Internet address: https://eur-lex.europa.eu/content/news/Brexit-UK-withdrawal-from-the-eu.html?locale=en.

(b) the right of permanent residence in the territory of the Member States for Union citizens and their family members;

(c) the limits placed on the rights set out in (a) and (b) on grounds of public policy, public security or public health.'

17. In the words of Article 3(1) of Directive 2004/38:

'This Directive shall apply to all Union citizens who move to or reside in a Member State other than that of which they are a national, and to their family members as defined in point 2 of Article 2 who accompany or join them.'

18. Article 7 of Directive 2004/38, entitled 'Right of residence for more than three months', provides in paragraph 1(b) and (d):

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

…

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

…

(d) are family members [within the meaning of Article 2(2)] accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).'

19. In the words of Article 24 of that directive, entitled 'Equal treatment':

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

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

20. Article 37 of Directive 2004/38 provides:

'The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.'

B. United Kingdom law

1. The EU Settlement Scheme – Immigration Rules Appendix EU

21. The EU Settlement Scheme – Immigration Rules Appendix EU ('Appendix EU')[7] creates, according to the explanations provided by the United Kingdom Government, a new system conceived in preparation for and in consequence of the withdrawal of the United Kingdom from the European Union. It allows all citizens of the European Union, the European Economic Area (EEA) and Switzerland residing in the United Kingdom before 31 December 2020 and their family members to seek leave to remain in the United Kingdom. Appendix EU entered into force on 30 March 2019. It provides that applications for leave to remain must be submitted no later than 30 June 2021.[8]

22. Appendix EU provides for the grant of:

– indefinite leave to remain in the United Kingdom, to applicants who have lived continuously in the United Kingdom for five years, under Articles 2, 2A and 11 to 13, and

– five years' limited leave to remain in the United Kingdom, which allows applicants to complete the requisite length of residence to be able to apply for indefinite leave to remain, under Articles 3, 3A and 14.

23. According to the United Kingdom Government, unlike Article 7 of Directive 2004/38,[9] Appendix EU permits economically inactive citizens who do not currently have a right of residence under EU law to continue to reside on the territory pending the United Kingdom's withdrawal from the European Union. Those persons may thus obtain indefinite leave to remain after five years of simple residence. After obtaining that status, they have unconditional access to the United Kingdom's social welfare system.

2. The 2016 Universal Credit Regulations

24. The Universal Credit Regulations (Northern Ireland) 2016, as amended by the Social Security (Income-related Benefits) (Updating and Amendment) (EU Exit) Regulations (Northern Ireland) 2019,[10][11] contain provisions intended to determine the persons entitled to Universal Credit and how it is to be calculated.

25. Universal Credit is a social protection scheme funded by taxation and subject to conditions based on income; its objective is to replace several other social benefits which have ceased to exist (or are still in force), like the Jobseeker's Allowance and Employment and Support Allowance, Income Support, Working Tax Credit, Child Tax Credit and Housing Benefit.[12]

7 https://www.gov.uk/guidance/immigration-rules/immigration-rules-appendix-eu.

8 This is the same deadline as that for applications submitted under Article 18(1)(b) of the Agreement on the withdrawal of the United Kingdom, with effect from 1 January 2021. See also footnote 29 to this Opinion.

9 The United Kingdom refers to the judgment of 21 December 2011, *Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866; 'the judgment in *Ziolkowski and Szeja*').

10 'The 2019 Social Security Regulations'.

11 Together, 'the 2016 Universal Credit Regulations'.

12 See the Explanatory Memorandum to the 2016 Universal Credit Regulations, available at: https://www.legislation.gov.uk/nisr/2016/216/pdfs/nisrem_20160216_en.pdf.

26. The fact of being in Northern Ireland is a condition of entitlement to Universal Credit, pursuant to Article 9(1)(c) of the Welfare Reform (Northern Ireland) Order 2015. [13]

27. Regulation 9 of the 2016 Universal Credit Regulations provides:

'(1) For the purposes of determining whether a person meets the basic condition to be in Northern Ireland, except where a person falls within paragraph (4), a person is to be treated as not being in Northern Ireland if the person is not habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland.

(2) A person must not be treated as habitually resident in the United Kingdom, the Channel Islands, the Isle of Man or the Republic of Ireland unless the person has a right to reside in one of those places.

(3) For the purposes of paragraph (2), a right to reside does not include a right which exists by virtue of, or in accordance with –

(a) regulation 13 of the Immigration (European Economic Area) Regulations 2016 [14] or Article 6 of [Directive 2004/38],

(b) regulation 14 of the [EEA Regulations], [15] but only in cases where the right exists under that regulation because the person is –

    (i) a qualified person for the purposes of regulation 6(1) of those Regulations as a jobseeker, or

    (ii) a family member (within the meaning of regulation 7 of those Regulations) of such a jobseeker,

(c) regulation 16 of the EEA Regulations, but only in cases where the right exists under that regulation because the person satisfies the criteria in regulation 16(5) of those Regulations [16] or Article 20 [TFEU] (in a case where the right to reside arises because a British citizen would otherwise be deprived of the genuine enjoyment of their rights as a European citizen), or

(d) a person having been granted limited leave to enter, or remain in, the United Kingdom under the Immigration Act 1971 by virtue of –

    (i) [*Appendix EU*], [17] or

[13] What are essentially the same provisions apply in the rest of the United Kingdom, the reference territory being Great Britain, in accordance with section 4(1)(c) of the Welfare Reform Act 2012 and the 2019 Social Security Regulations.

[14] 'The EEA Regulations'. That regulation covers the initial right of residence and deals with residence of less than three months.

[15] This regulation refers to the extended right of residence, corresponding to the right of residence referred to in Article 7 of Directive 2004/38.

[16] That is to say, a person who is the primary carer of a British citizen.

[17] Emphasis added. This is the amendment resulting from the 2019 Social Security Regulations that forms the basis of the request for a preliminary ruling. In its written observations, the Department for Communities in Northern Ireland states that the reference in the referring court's first and second questions to Regulation 9(3)(c)(i) is to the provision applicable in Great Britain. Consequently, for the purposes of the present reference for a preliminary ruling, which comes from Northern Ireland, the questions should be taken to refer to Regulation 9(3)(d)(i) of the 2016 Universal Credit Regulations, which is the equivalent provision for Northern Ireland.

(ii) being a person with a Zambrano right to reside [judgment of 8 March 2011, *Ruiz Zambrano* (C-34/09, EU:C:2011:124)] as defined in Annex 1 of [Appendix EU] made under section 3(2) of that Act.

(4) A person falls within this paragraph if the person is –

(a) a qualified person for the purposes of regulation 6 of the EEA Regulations as a worker or a self-employed person,

(b) a family member of a person referred to in sub-paragraph (a) within the meaning of regulation 7(1)(a), (b) or (c) of the EEA Regulations, [18]

(c) a person who has a right to reside permanently in the United Kingdom by virtue of regulation 15(1)(c), (d) or (e) of the EEA Regulations,

(d) a refugee within the definition in Article 1 of the Convention relating to the Status of Refugees done at Geneva on 28th July 1951, as extended by Article 1(2) of the Protocol relating to the Status of Refugees done at New York on 31st January 1967,

(e) a person who has been granted, or who is deemed to have been granted, leave outside the rules made under section 3(2) of the Immigration Act 1971 where that leave is –

(i) discretionary leave to enter or remain in the United Kingdom,

(ii) leave to remain under the Destitution Domestic Violence concession, or

(iii) leave deemed to have been granted by virtue of regulation 3 of the Displaced Persons (Temporary Protection) Regulations 2005,

(f) a person who has humanitarian protection granted under those rules, or

(g) a person who is not a person subject to immigration control within the meaning of section 115(9) of the Immigration and Asylum Act 1999 and who is in the United Kingdom as a result of their deportation, expulsion or other removal by compulsion of law from another country to the United Kingdom.'

III. The dispute in the main proceedings and the questions referred for a preliminary ruling

28. The appellant in the main proceedings, CG, is a Netherlands and Croatian national, a single mother of two very young children, [19] who has declared that she arrived in Northern Ireland in 2018. [20] She has never carried out an economic activity in the United Kingdom and lived with her

[18] It is stated in the order for reference that, according to the Universal Credit service, the definition of 'family member who has retained the right of residence' mirrors that set out in regulation 10 of the EEA Regulations and that CG cannot claim such status as she has not demonstrated that she was married or was still in a durable relationship with her partner, an EU citizen.

[19] According to the documents in the file, the two children were born in the United Kingdom, on 1 March 2019 and in 2020, respectively. The elder child is under school age. The Appeal Tribunal for Northern Ireland (United Kingdom), the referring court, stated in answer to the questions put by the Court concerning the request for an expedited procedure that, according to CG, the two children are the subject of Social Services Supervision Orders.

[20] CG states that she arrived in the United Kingdom 'in late 2018 or early 2019', so that her partner could take up an offer of employment. The European Commission takes the date to be 21 January 2019.

partner, a Union citizen, of Netherlands nationality and the father of her children, until she moved to a women's refuge following allegations of domestic violence. [21] CG has no resources and has no access to any social security benefits at all to provide for her and her two children's needs.

29. On 4 June 2020, CG was granted pre-settled status in the United Kingdom on the basis of Appendix EU. Pre-settled status is granted by the United Kingdom Home Office to Union citizens who have been resident in the United Kingdom for a period of less than five years, without being subject to a condition that they have sufficient resources. That status provides the possibility of remaining in the United Kingdom for a fixed period of five years after the end of the transition period [22] laid down in the Agreement on the withdrawal of the United Kingdom.

30. As regards CG's right of residence, [23] the referring court states that:

– CG cannot rely on the capacity of 'family member', since she has not demonstrated that she is married or that she still maintains a durable relationship with a Union citizen, and

– CG obtained temporary leave to remain, which must be distinguished from a 'residence permit'.

31. On 8 June 2020, CG applied to the Department for Communities in Northern Ireland for Universal Credit. That department refused her application by decision of 17 June 2020 on the basis of Regulation 9(3)(d)(i) of the 2016 Universal Credit Regulations, inserted by the 2019 Social Security Regulations, on the ground that, by the effect of that amendment, Union citizens with a right to reside in the United Kingdom for a fixed period on the basis of Appendix EU do not satisfy the condition of residence in Northern Ireland set out in that article to obtain social assistance. CG's administrative appeal was dismissed on 30 June 2020.

32. The referring court is hearing CG's appeal against that decision. CG disputes the legality of Regulation 9(3)(d)(i) of the 2016 Universal Credit Regulations. She maintains that that provision, which excludes from social assistance Union citizens whom the United Kingdom recognises as being legally resident on its territory, is incompatible with the United Kingdom's obligations under the European Communities Act 1972 [24] and infringes Article 18 TFEU.

33. CG claims, in that respect, that the refusal to grant her social assistance, when she was granted a right of residence for a fixed period under national law, even though she would not have had a right of residence under EU law, constitutes different treatment by comparison with United Kingdom citizens and therefore discrimination on the ground of nationality.

[21] According to CG's observations, after moving back and forth several times between the residence which she shared with her violent partner and that refuge, she definitively settled in the refuge in early 2020. In its answer to the question put by the Court concerning the request for an expedited procedure, the referring court informed the Court that CG's accommodation in a refuge cannot be regarded as settled accommodation. In her written observations, CG stated that she moved to self-contained accommodation provided by social services in January 2021.

[22] See point 12 of this Opinion.

[23] In her written observations, CG stated, first, that for the first three months of her residence in the United Kingdom, she had the right to reside there without conditions or formalities, in accordance with Article 6 of Directive 2004/38. Upon expiry of that three-month period, she was not asked by the United Kingdom authorities to prove a continuing right of residence. She was not asked or required to leave the United Kingdom. CG and her first child left the United Kingdom temporarily for the Netherlands, between October 2019 and January 2020, to stay with her parents, and they then returned to the United Kingdom. She emphasises that she has spent the whole of her residence in Northern Ireland. Second, she states that she is not eligible for permission for indefinite leave to remain as a victim of domestic violence. Her application in that regard, submitted on 11 November 2020, was refused on 3 March 2021. See, for the conditions for obtaining such leave, footnote 18 to this Opinion.

[24] The European Communities Act 1972 is the law on the accession of the United Kingdom to the European Union.

34. The Department for Communities in Northern Ireland contends, on the contrary, that under United Kingdom law pre-settled status does not, of itself, confer any right to social benefits, which remain subject to their own eligibility conditions.

35. It observes that the circumstances of the present case are different from those of the case that gave rise to the judgment of 7 September 2004, *Trojani*, [25] and that the national courts have consistently followed the judgment of the Supreme Court (United Kingdom) of 16 March 2011 in *Patmalniece*, where it was held that although the application of the habitual residence test was indirectly discriminatory, it was justified.

36. In those circumstances, the Appeal Tribunal for Northern Ireland decided to stay the proceedings and to submit the following questions to the Court for a preliminary ruling:

'(1) Is Regulation 9(3)[d](i) of the [2016 Universal Credit Regulations], which was inserted by [the 2019 Social Security Regulations], which excludes from entitlement to social security benefits [EU citizens] with a domestic right of residence (Limited Leave to Remain) [in this case "pre-settled status" under Appendix EU] unlawfully discriminatory (either directly or indirectly) pursuant to Article 18 [TFEU] and inconsistent with the [United Kingdom's] obligations under the European Communities Act 1972?

(2) If the answer to question 1 is in the affirmative, and Regulation 9(3)[d](i) of the [2016 Universal Credit Regulations] is held to be indirectly discriminatory, is [that provision] justified pursuant to Article 18 [TFEU] and inconsistent with the [United Kingdom's] obligations under the European Communities Act 1972?'

37. On 11 February 2021, the President of the Court of Justice granted the request for an expedited procedure, in accordance with Article 105 of the Rules of Procedure.

38. CG, [26] the Department for Communities in Northern Ireland, the Government of the United Kingdom and the Commission lodged written observations and submitted oral argument at the hearing on 4 May 2021.

[25] C-456/02, EU:C:2004:488; 'the judgment in *Trojani*'.

[26] In her written observations, CG stated that, in the case of *Fratila* v *Secretary of State for Work and Pensions* [2020] EWCA Civ 1741, provisions analogous to those being challenged in the present case, covering Great Britain, were held to be unlawful as discriminatory on the ground of nationality, contrary to Article 18 TFEU, by decision of 18 December 2020 of the Court of Appeal (United Kingdom). That decision was the subject of an appeal by the Secretary of State for Work and Pensions (United Kingdom) before the Supreme Court, with the hearing set for 18 and 19 May 2021. CG states that that procedure concerns two Romanian nationals, Ms Fratila, who came to the United Kingdom, worked for just under a year and then lost worker status. She claimed and was refused Universal Credit. Shortly beforehand, she had been granted pre-settled status. At that time, she had been in the United Kingdom for almost five years. She was subsequently granted settled status and awarded Universal Credit. The other person involved, Mr Tanase, has life-long disabilities and uses a wheelchair. He came to the United Kingdom to receive care from Ms Fratila. He receives various benefits from Romania, including a disability pension, a basic retirement pension and an allowance for costs of care. He was also refused Universal Credit shortly after being granted pre-settled status. He had been resident in the United Kingdom for five months. See paragraphs 13 and 14 of the decision available at:
https://files.gcnchambers.co.uk/wp-content/uploads/2020/12/18111043/Fratila-v-Secretary-of-State-for-Work-and-Pensions-2020-EWCA-1741-18-December-2020.pdf.

IV. Analysis

39. The referring court is seeking to ascertain whether there is direct or indirect discrimination, for the purposes of Article 18 TFEU, as a result of the exclusion of certain Union citizens residing in the United Kingdom from social benefits owing to the nature of the right of residence granted to them on the basis of national law.

40. The factual circumstances of the main proceedings and the Court's abundant case-law on equal treatment in relation to the right to social security benefits which Union citizens who have exercised their freedom of movement can claim prompt me to consider that it is necessary to clarify the framework to which the request for a preliminary ruling belongs.

A. The framework of the request for a preliminary ruling and its reformulation

41. In the first place, it is appropriate in my view to clarify the basis of the Court's jurisdiction, since the dispute has as its subject matter a claim for a social benefit, made on 8 June 2020 by a Union citizen residing in the United Kingdom, which was refused on 30 June 2020, or during the transition period fixed by the Agreement on the withdrawal of the United Kingdom.[27] In that regard, I would emphasise that the dispute does not concern the right of residence, called 'pre-settled status', which was granted to CG on 4 June 2020 in application of Appendix EU,[28] but the refusal of Universal Credit, which was based on the nature of her right of residence. Since all the facts and all the relevant national provisions applicable relate to either before or during the transition period, and since the referring court's request was registered by the Registry on 30 December 2020, the Court has jurisdiction to rule on the request for a preliminary ruling on the basis of Article 86(2) and (3) of the Agreement on the withdrawal of the United Kingdom.[29]

42. In the second place, as concerns the classification of the benefits sought by CG on the basis of Article 18 TFEU, on which the identification of the rule of EU law under which the compatibility of the national provisions by reference to the principle of equal treatment must be examined depends,[30] I observe that it is common ground that it is lack of resources that forms the basis of CG's application for Universal Credit for herself and her children[31] and that that benefit is classified as 'social assistance' for the purposes of Directive 2004/38. The additional point, made at the hearing, that the benefit sought by CG should cover health expenditure is not capable of altering that classification.

27 See point 12 of this Opinion.

28 On that date, the new residence status, established in Article 18 of the Agreement on the withdrawal of the United Kingdom, could not be granted. Although, under Article 19 of that agreement, during the transition period, applications for residence status may be made in advance, decisions accepting or refusing such applications took effect only on 1 January 2021. In addition, applicants must satisfy conditions equivalent to those set out in Directive 2004/38.

29 The position would be different, in application of the second subparagraph of Article 158(1) of the Agreement on the withdrawal of the United Kingdom, only if the procedure, initiated after 1 February 2020, or during the transition period, had had as its subject matter a decision on an application made pursuant to Article 19 of that agreement, which provides for the possibility of applying for a new residence status or residence document as provided for in Article 18 of that agreement (paragraphs 1 and 4).

30 See, in particular, judgment of 15 September 2015, *Alimanovic* (C-67/14, EU:C:2015:597; 'the judgment in *Alimanovic*'; paragraphs 42 to 44 and the case-law cited).

31 As to what the expression 'Universal Credit' covers, see point 25 of this Opinion. It serves to designate a variety of allowances, some of which may be governed by special rules of EU law. See, by way of illustration, judgment of 14 June 2016, *Commission* v *United Kingdom* (C-308/14, EU:C:2016:436; 'the judgment in *Commission* v *United Kingdom*'; paragraphs 27 and 55).

43. In accordance with the Court's settled case-law, that concept of 'social assistance' covers all non-contributory cash benefits, which constitute the expression of national solidarity and are funded as such.[32] Since it is intended to ensure the subsistence of the recipient, it is unconditional. In that regard, the Court has observed that subsistence benefits, which are intended to ensure that their recipients have the minimum means of subsistence necessary to lead a life in keeping with human dignity, must be held to be 'social assistance', within the meaning of Article 24(2) of Directive 2004/38.[33]

44. In the third place, the conditions of CG's residence are different from those laid down in Directive 2004/38. It is common ground that CG obtained on 4 June 2020, in application of Appendix EU, a *right of residence* called 'pre-settled status', which is granted without any conditions as to resources or subscription to social insurance even if the person has no occupational activity. That status allows him or her to reside lawfully in the United Kingdom for five years and at the end of that period to claim settled status, which will enable him or her to receive social assistance.

45. As CG, a Union citizen, exercised her freedom of movement and resides, in that capacity, on the territory of another Member State, her situation is covered by EU law,[34] even though a right of residence was granted to her under national law, on more flexible conditions than the requirements laid down by Directive 2004/38. It should be made clear, on that point, that as she acquired her right to reside and applied for social assistance during the transition period, the application of EU law is guaranteed by Article 127 of the Agreement on the withdrawal of the United Kingdom.

46. Consequently, and in the fourth place, as regards the applicability of the first paragraph of Article 18 TFEU, it should be borne in mind that it is settled case-law that that provision is intended to apply independently only to situations governed by EU law in respect to which the FEU Treaty does not lay down specific rules on non-discrimination.[35] So far as the right of Union citizens to reside on the territory of another Member State is concerned, the principle of non-discrimination is set out in Article 24 of Directive 2004/38.[36]

47. Thus, the mere fact that the situation at issue in the main proceedings comes within the scope of Directive 2004/38 means, in my view, that the situation should not be assessed by reference to Article 18 TFEU, as the referring court requests.

[32] On the concept of 'social assistance' in Article 7(1)(b) of Directive 2004/38 and its interpretation as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his or her own basic needs and the needs of his or her family, see judgment of 19 September 2013, *Brey* (C-140/12, EU:C:2013:565; 'the judgment in *Brey*'; paragraphs 60 and 61).

[33] See judgment of 6 October 2020, *Jobcenter Krefeld* (C-181/19, EU:C:2020:794; 'the judgment in *Jobcenter Krefeld*'; paragraph 57 and the case-law cited).

[34] See judgment of 11 November 2014, *Dano* (C-333/13, EU:C:2014:2358; 'the judgment in *Dano*'; paragraph 59).

[35] See, in particular, the judgment in *Jobcenter Krefeld* (paragraph 78 and the case-law cited).

[36] See, in particular, the judgment in *Dano* (paragraphs 59 to 61). I note that in Part Two of the Agreement on the withdrawal of the United Kingdom (see point 8 of this Opinion), Article 18 TFEU is reproduced in Article 12, and its more specific expression, namely Article 24 of Directive 2004/38, is reproduced in Article 23 of that agreement. On the case-law preceding the entry into force of that directive, see point 54 of this Opinion.
See also the analysis by Robin-Olivier, S., 'Les droits sociaux des "étrangers communautaires"', *L'Avenir de l'État de Droit Social en Europe*, Julia Iliopoulos-Strangas (ed.), Nomos Verlagsgesellschaft, Baden-Baden, 2015, pp. 217-246, especially pp. 221 and 228. See, to the same effect, Rondu, J., 'Chapitre 2 – L'individu relevant du seul droit national, résultante du caractère partiel de l'intégration', *L'individu, sujet du droit de l'Union européenne*, Bruylant, Brussels, 2020, pp. 683-756, especially p. 711, paragraph 898. That author considers that Article 18 TFEU no longer applies, since the *lex specialis* of Article 24 of Directive 2004/38 replaces the *lex generalis* of the principle of equal treatment in the Treaties.

48. Consequently, no argument can be derived from the analogy between the facts of the case in the main proceedings and those that gave rise to the judgments of the Court interpreting the provisions of the EC Treaty equivalent to the provisions of Article 18 TFEU, in cases where the right of residence was granted on the basis of national law, before Directive 2004/38 entered into force,[37] even though that case-law remains relevant in certain aspects in that the Court implemented the principle of non-discrimination, subsequently set out in Article 24 of that directive.[38]

49. In other words, since the principle of the applicability of Directive 2004/38 and, more specifically, Article 24 is established, and since the situation at issue comes within the scope of that directive, it is no longer by reference to Article 18 TFEU that the question of the rights to social assistance must be examined, unless contradictory reasoning were to be adopted.[39]

50. It should be borne in mind that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it.[40]

51. I therefore propose that the Court reformulate the two questions submitted by the referring court, which in my view should be examined together, and consider that the referring court is asking, in essence, whether Article 24 of Directive 2004/38 must be interpreted as precluding the legislation of a Member State which excludes from social assistance Union citizens to whom it has granted a legal right of residence that is not conditional on resources, although such assistance is guaranteed to nationals of the Member State concerned who are in the same situation of extreme poverty and whether, should that be the case, such discrimination may be justified.

52. At this stage of the discussion, it is appropriate to take stock of the current position of the Court's case-law on the applicability of Article 24 of Directive 2004/38 before assessing the possibility that it might be further developed where a legal right of residence is granted by the effect of national legislation which is more favourable than the requirements laid down in that directive.

B. The test of the applicability of Article 24 of Directive 2004/38 derived from the right of residence 'on the basis of [the] Directive' in relation to the right to social assistance

53. I note that, since Directive 2004/38 entered into force, the Court has not ruled on the effects, in relation to social assistance, of a *legal right of residence*, granted in conditions which are not those provided for under EU law governing the entry and residence of nationals of the Member States who have exercised their freedom of movement.

[37] It is stated in CG's written observations that she cited the judgment in *Trojani* in support of her claim, in order to rely on the application of Article 18 TFEU.

[38] See, in particular, the judgment in *Brey* (paragraph 44 and the case-law cited).

[39] In that regard, I note that at the hearing the Commission initially adopted that line of reasoning, which appeared in its written observations, without however relying on the judgments cited there, but then reformulated it subsequently in answer to a question from the Court relating to the applicability of the Charter. In that regard, see point 81 of this Opinion.

[40] See the judgment in *Brey* (paragraph 31).

54. Before Directive 2004/38 entered into force, on the other hand, the Court held that *citizens of the European Union lawfully resident* on the territory of a host Member State can rely on the principle of non-discrimination, now laid down in Article 18 TFEU, in order to receive social assistance. [41]

55. Since the entry into force of Directive 2004/38, the Court has interpreted Article 24 of that directive on the basis of situations in which the persons concerned did not satisfy the conditions to obtain a right of residence laid down in that directive and had only residence certificates of unlimited duration, which have only declaratory value. [42] I would point out, in that regard, that Article 7(1)(b) of Directive 2004/38 provides that all Union citizens are to have the right of residence on the territory of another Member State for a period of longer than three months if they have sufficient resources not to become a burden on the social assistance system of the host Member State and have sickness insurance. If a Union citizen satisfies those conditions, he or she cannot be refused residence. *A contrario*, that means that Member States are not required to permit residence by nationals of other Member States who do not have sufficient resources.

56. The Court has held that Article 24 of Directive 2004/38 does not preclude the legislation of a Member State which excludes from the benefit of certain 'non-contributory cash benefits' which also constitute 'social assistance' within the meaning of paragraph 2 of that article, nationals of other Member States who did not satisfy the conditions laid down in Article 7(1)(b) of that directive and could not therefore rely on a right of residence under that provision. [43] In the judgment in *Brey*, the Court laid down a condition, namely that that exclusion must not be automatic in all circumstances. [44]

57. To my mind, an important consequence of that interpretation by the Court of the principle of equal treatment set out in Article 24 of Directive 2004/38 must be emphasised.

58. In the judgment in *Dano*, the Court, after observing that the situation at issue fell outside the scope of Article 24(2) of Directive 2004/38 [45] and that that provision constitutes a derogation from the principle of non-discrimination laid down in Article 18 TFEU, [46] nonetheless sought to ascertain, on the basis of Article 24(1) of that directive, the circumstances in which a citizen in possession of a residence permit may be *refused* the grant of social benefits, although the only exclusions from the principle of equal treatment are listed in paragraph 2 of that article.

41 See judgment of 20 September 2001, *Grzelczyk* (C-184/99, EU:C:2001:458; 'the judgment in *Grzelczyk*'; paragraphs 32, 33 and 35), and the judgment in *Trojani* (paragraphs 37 and 40).

42 See the judgments in *Brey* (paragraph 18), *Dano* (paragraph 36), and *Alimanovic* (paragraph 27). According to settled case-law, the grant of a residence permit does not confer rights, but has only a declaratory effect. It does not confer a right of residence (see, in particular, judgment of 14 September 2017, *Petrea* (C-184/16, EU:C:2017:684, paragraphs 32 and 33)). Conversely, that qualification does not exclude an EU citizen who was resident in the host Member State *before* the entry into force of the directive, but was legally resident on the basis of another instrument of EU law (judgment of 7 October 2010, *Lassal* (C-162/09, EU:C:2010:592)).

43 See the judgment in *Dano* (paragraphs 65 and 66).

44 See paragraph 80 of that judgment.

45 See the judgment in *Dano* (paragraph 66).

46 See the judgment in *Dano* (paragraphs 61 and 64).

59. The Court inferred from that reasoning concerning the conditions of the application of Article 24 of Directive 2004/38 [47] that national legislation which limits access to social assistance solely to Union citizens whose residence on the territory of the host Member State is consistent with the conditions laid down in Article 7 of Directive 2004/38 does not constitute unequal treatment. [48]

60. In order to reach that decision, the Court relied on the expression 'residing on the basis of this Directive' in Article 24(1) of Directive 2004/38. It inferred from that wording that the principle of equal treatment can benefit only Union citizens who are lawfully resident on the territory of another Member State because they satisfy the conditions laid down in Article 7 of that directive. In doing so, the Court disregarded the protection afforded by Article 24(1) of that directive to Union citizens who, like CG, were granted a five-year right of residence in a Member State without any condition as to resources and who do not show that they have such resources, for the purposes of Article 7(1)(b) of that directive. Nor can those persons rely on the protection afforded by Article 18 TFEU, for the reasons stated in point 47 of this Opinion.

61. That has the consequence that a Union citizen who is lawfully resident on the territory of a Member State, although he or she does not have means of subsistence, may be treated differently from the nationals of that State on the sole ground that the host State has granted him or her a right of residence without conditions as to resources.

62. That test, derived from the benefit of the right of residence 'on the basis of [the] Directive', according to the expression used in Article 24(1) of Directive 2004/38, therefore lies, in my view, at the core of the novel question before the Court, in that that question does not relate to another provision of EU law that would give rise to the right of residence. [49]

63. The justification for that test, which aims to limit the grant of benefits in order to protect the financial equilibrium of the social assistance system of the Member States from an unreasonable burden, [50] is linked with the drafting history of Directive 2004/38, referred to in the judgment in *Ziolkowski and Szeja* [51] – to which the Court referred in the judgment in *Dano*, in paragraphs 70 to 72 – and also in the judgment in *Jobcenter Krefeld*, delivered on 6 October 2020, in paragraph 63.

47 In that regard, see Martin, D., 'Article 24 – Égalité de traitement', *Directive 2004/38 relative au droit de séjour des citoyens de l'Union européenne et des membres de leur famille*, Bruylant, Brussels, 2020, pp. 373-396, especially. p. 380, paragraph 16, where the author asks, 'since the European legislature did not intend, in Article 24 of the directive, to place restrictions on the right to non-discrimination established in paragraph 1, other than those set out in paragraph 2, was the Court of Justice still entitled to interpret paragraph 1 as implicitly including a condition of integration?'

48 In its judgment in *Commission* v *United Kingdom*, the Court confirmed the meaning of its case-law (paragraphs 66 to 69). See also point 77 of this Opinion, concerning the judgment in *Alimanovic* and the judgment of 25 February 2016, *García-Nieto and Others* (C-299/14, EU:C:2016:114; 'the judgment in *García-Nieto and Others*'), delivered subsequently, concerning the conditions laid down, respectively, in Article 14(4)(b) and Article 6(1) of that directive. Furthermore, as regards the importance of those decisions in the context of the main proceedings, I refer to the observation of Iliopoulou-Penot, A., 'Chapitre 11 – Citoyenneté de l'Union et accès des inactifs aux prestations sociales dans l'État d'accueil', *Le rôle politique de la Cour de justice de l'Union européenne*, Clément-Wilz, L. (ed.), Bruylant, Brussels, 2018, pp. 315-334, especially p. 318, according to which 'the political agreement which the European Council [had] reached on 19 February 2016, in a vain attempt to avoid Brexit, reproduce[d] word for word the solutions adopted in the judgments in *Dano* and *Alimanovic*, thus emphasising their importance in the discussion of the United Kingdom's "new place" in the Union'. See also, concerning the positions adopted by the United Kingdom in 2017, footnote 55 to this Opinion.

49 See, in that regard, the judgment in *Jobcenter Krefeld* (paragraph 62).

50 See the judgment in *Jobcenter Krefeld* (paragraph 66).

51 See paragraphs 36 and 37 of that judgment.

64. In the latter judgment, however, the Court held that where persons fall within the scope of Article 24 of Directive 2004/38, including the derogation provided for in Article 24(2), on the ground that they have a right of residence based on Article 14(4)(b) of that directive, but can also rely on an independent right of residence based on Article 10 of Regulation (EU) No 492/2011, [52] that derogation cannot be used against them. [53]

65. Consequently, as the Court's case-law stands following the judgment in *Jobcenter Krefeld*, the benefit of equal treatment in the context of Directive 2004/38 is no longer restricted to the situations referred to in that directive but also applies to those in which the right of residence is based on another provision of secondary law. [54]

66. Thus, as in the case that gave rise to the judgment in *Jobcenter Krefeld*, it is necessary to determine the consequences for the interpretation of Article 24 of Directive 2004/38 that must follow from the grant of legal residence to Union citizens by a Member State in conditions more favourable than those laid down in that directive with respect to the decision to exclude those citizens from social assistance on the sole ground of their pre-settled status. [55]

C. The applicability of Article 24 of Directive 2004/38 in the event of the grant of a 'national legal' right of residence

67. It follows from the parties' answers at the hearing that, in establishing, by Appendix EU, a right of residence without any particular requirement, in particular as regards the Union citizen's resources, the United Kingdom adopted a more favourable measure within the meaning of Article 37 of Directive 2004/38. [56]

68. This is not the first time that the Court will rule on the effects of that provision, introduced in Directive 2004/38.

69. In the judgment in *Ziolkowski and Szeja*, the Court held that the fact that national provisions concerning the right of residence that are more favourable than those laid down in Directive 2004/38 are not to be affected does not in any way mean that such provisions must be incorporated into the system introduced by the directive. [57] The Court also held that it is for each

[52] On the autonomous application, by comparison with provisions of EU law, such as those of Directive 2004/38, of Article 10 of the Regulation of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1), which allows the children of a national of a Member State who works or has worked in the host Member State, together with the parent who is their primary carer, to rely on that provision without being required to satisfy the 'sufficient resources' and 'comprehensive sickness insurance cover' conditions, see the judgment in *Jobcenter Krefeld* (paragraphs 38 and 39 and the case-law cited).

[53] See the judgment in *Jobcenter Krefeld* (paragraph 69).

[54] See the judgment in *Jobcenter Krefeld* (paragraph 87).

[55] See, in that regard, judgment in *Jobcenter Krefeld* (paragraph 62). As regards the United Kingdom's decision not to create any new entitlement to benefits for persons having limited right to remain, the United Kingdom explained, in its written observations, that that decision is consistent with its public statements which were published in June 2017 in a document entitled *Safeguarding the Position of EU Citizens Living in the UK and UK Nationals Living in the EU* (see, more specifically, paragraph 41).

[56] See O'Brien, C., 'Between the devil and the deep blue sea: vulnerable EU citizens cast adrift in the UK post-Brexit', *Common Market Law Review*, vol. 58, 2021, Kluwer Law International, Alphen-sur-le-Rhin, 2021, pp. 431-470, especially pp. 456-457. The United Kingdom's decision to create an unconditional right to reside for Union citizens in the context of the withdrawal of the United Kingdom from the European Union, namely pre-settled status, instead of simply making a right to reside conditional on meeting the requirements of Directive 2004/38, or creating only a declaratory status (that did not confer rights), was coupled in 2019 with an explicit exclusion of that particular right to reside from social benefits, unless citizens prove that they come within the conditions of Directive 2004/38, under the 2016 Universal Credit Regulations. According to that author, the United Kingdom's decision to do so was influenced by the excessive administrative burden that would have been placed on the authorities if the right to reside post-Brexit for EU citizens had been made conditional on meeting the criteria in Article 7 of Directive 2004/38.

[57] The judgment in *Ziolkowski and Szeja* (paragraph 49).

Member State to decide not only whether it will adopt such a system but also the conditions and effects of that system, in particular as regards the legal consequences of a right of residence granted on the basis of national law alone.[58] What, then is the position in relation to social assistance?

1. The scope of the judgment in Ziolkowski and Szeja

70. I would observe at the outset that in the judgment in *Ziolkowski and Szeja* the Court ruled on a question concerning the acquisition of a right of permanent residence under a new provision inserted into Article 16 of Directive 2004/38.[59] That decision therefore did not concern the grant of social assistance to a Union citizen residing in a Member State and did not have to take into consideration a need to protect the persons concerned or issues connected with an unreasonable burden for the finances of that State that might be caused by the grant of such assistance to persons having a residence permit on humanitarian grounds like those issued in that case.[60] Nor was the Court required to interpret Article 24 of Directive 2004/38 and assess a possible difference in treatment between a Union citizen residing on the territory of a Member State and the nationals of that State.

71. It therefore seems to me that the conclusions which the Court reached in the judgment in *Ziolkowski and Szeja* when interpreting Article 37 of Directive 2004/38 in the light of the permanent right of residence provided for in Article 16 of that regulation cannot be usefully transposed in a matter concerning equal treatment of citizens of the European Union with respect to the conditions governing the grant of social assistance.

72. In that regard, it should in my view be emphasised, in the first place, that, unlike Article 16 of Directive 2004/38, which created a permanent right of residence, Article 24 of that directive merely constitutes the implementation, in relation to the right of residence of Union citizens, of the principle of non-discrimination between Union citizens laid down in Article 18 TFEU. Consequently, there cannot be situations in which a Union citizen could be lawfully resident on the territory of another Member State without benefiting from the right to non-discrimination associated with his or her status in the conditions laid down in Article 24.

73. In the second place, such a solution seems to me to be consistent with the objective pursued by Article 37 of Directive 2004/38. The option for Member States to adopt provisions more favourable than those laid down in that directive in relation to the right of residence is meaningless unless it is implemented in order to adapt to particular circumstances.

74. Consequently, I consider that the Court's interpretation of the concept of 'legal residence' should be adapted when it is a question of ensuring respect for the principle of equal treatment between Union citizens in matters relating to social benefits within the framework strictly defined in Article 24 of Directive 2004/38.

58 The judgment in *Ziolkowski and Szeja* (paragraph 50).

59 See paragraph 51 of that judgment. The Court thus held that residence, under a right consistent with the law of a Member State, but not satisfying the conditions laid down in EU law, cannot be considered legal residence, within the meaning of Article 16(1) of Directive 2004/38, for the purpose of acquiring a right of permanent residence. See, also, judgment of 2 May 2018, *K. and H. F. (Right of residence and allegations of war crimes)* (C-331/16 and C-366/16, EU:C:2018:296, paragraph 74).

60 The judgment in *Ziolkowski and Szeja* (paragraphs 18 and 19).

2. The interpretation of the concept of 'legal residence'

75. First, I am of the view that the mere finding that a person who is lawfully resident in another Member State has the status of Union citizen [61] should lead to the conclusion that the concept of 'legal residence' covers that of a 'right to reside lawfully', [62] a fortiori where the national law of that Member State chooses, because of that status of Union citizen, to allow economically inactive citizens to remain on its territory, without conditions as to resources or social insurance.

76. Second, such an interpretation, which has the effect of not extending the scope of Article 24(2) of Directive 2004/38, satisfies the requirement that that provision be interpreted strictly and in accordance with the provisions of the FEU Treaty, including those relating to citizenship of the Union and freedom of movement for workers, as referred to in the judgment in *Jobcenter Krefeld*. [63]

77. In that regard, that interpretation is based on the need, referred to in the judgment in *Jobcenter Krefeld*, [64] to distinguish certain situations from the earlier cases that gave rise to the judgments in *Alimanovic* and in *García-Nieto and Others*, relating to the exclusions expressly provided for in Article 24(2), [65] and to the judgment in *Dano*. [66]

78. Third, that interpretation of Article 24(1) of Directive 2004/38, which guarantees that 'all Union citizens residing on the basis of [that] Directive in the territory of the host Member State' are to enjoy equal treatment, is also consistent with the objective pursued by that directive. While particular attention must clearly be paid to the freedom of Member States to apply more favourable provisions for Union citizens who have exercised their freedom of movement and freedom to reside for more than three months in a Member State of which they are not nationals, such provisions must not however have the consequence of restricting the protection guaranteed in Article 18 TFEU, of which Article 24(1) constitutes only a specific expression.

[61] In that regard, it is pointed out that, in the judgment in *Grzelczyk*, in paragraph 31, the Court held that 'Union citizenship is destined to be the fundamental status of nationals of the Member States, enabling those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for'. See, also, judgment of 17 September 2002, *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 83).

[62] It should be noted that I take the expression 'right to reside lawfully' from the judgment in *Commission* v *United Kingdom*, used in some cases on the basis of provisions transposing Article 7 of Directive 2004/38, but also to express more generally the condition of lawfulness of residence (see paragraphs 72, 80 and 81). Verschueren, H., 'The right to reside and to social benefits for economically inactive EU migrants: how to balance freedom of movement and solidarity?', *La libre circulation sous pression; Régulation et dérégulation des mobilités dans l'Union européenne*, Damay, L. et al. (eds), Bruylant, Brussels, 2018, pp. 33-51, especially p. 45, derives from the finding of the use of the expression 'lawful residence', without always referring to Directive 2004/38, the argument that such residence may be based on another provision of EU law, which was confirmed in the judgment in *Jobcenter Krefeld*, but also on a more favourable provision of national law, as in, in particular, the judgment in *Trojani*.

[63] See paragraph 60 of that judgment.

[64] See paragraphs 67, 68 and 87 of that judgment.

[65] It is pointed out in paragraphs 67 and 87 of that judgment that those cases concerned citizens who had, respectively, a right of residence based solely on Article 14(4)(b) of Directive 2004/38, on the ground that the citizen concerned was seeking employment, or a right of residence for a period of no more than three months on the basis of Article 6(1) of that directive.

[66] In paragraph 68 of that judgment, it is stated that that case concerned nationals of a Member State who were economically inactive and who had exercised their freedom of movement with the sole aim of receiving social assistance from another Member State and who had no right of residence in the host Member State based on Directive 2004/38 or an any other provision of EU law.

79. In that regard, the Court has consistently held that the margin for manoeuvre which the Member States are recognised as having must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38, which is, inter alia, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States, and the practical effectiveness of that directive. [67]

80. Fourth, such an interpretation is not inconsistent with the objective pursued by the EU legislature in Article 24(2) of Directive 2004/38, which follows from recital 10 of that directive. In this instance, it may reasonably be thought that the risk of upsetting the financial equilibrium of the United Kingdom's social assistance system that would be caused by the economically inactive persons whose needs of subsistence would have to be met was evaluated by that Member State before it created a right of residence for a period of five years that could be exercised without conditions as to resources and that the temporary nature of that right to reside was necessarily taken into consideration.

81. Fifth, that interpretation is supported by the finding that, by granting a right of residence to a Union citizen in more favourable conditions than those laid down in Directive 2004/38, a Member State is implementing EU law, for the purposes of Article 51(1) of the Charter. In that regard, I am of the view that the scope of the Court's decision in the judgment in *Dano* concerning the possibility of relying on Articles 1 and 20 of the Charter is limited, since it relates to the conditions for the grant of special non-contributory cash benefits in the context of persons not having a legal right of residence. [68]

82. All of those arguments lead me to assert that a Union citizen is intended to benefit, as regards access to social assistance, from equal treatment with nationals of the host Member State, as stated in Article 24 of Directive 2004/38, where his or her right of residence on the territory of that State results from a measure adopted by that State in the conditions laid down in Article 37 of that directive.

83. It is now appropriate to examine the conditions in which respect for the principle of equal treatment may be guaranteed.

3. The implementation of the principle of equal treatment laid down in Article 24 of Directive 2004/38

84. The principle of equal treatment, as laid down in Article 24(1) of Directive 2004/38 with the derogations set out in Article 24(2), could in my view lead, following on from the Court's decision in the judgment in *Jobcenter Krefeld*, [69] to Article 24 being interpreted as precluding, in principle, the legislation of a Member State under which nationals of other Member States

[67] See the judgment in *Brey* (paragraph 71 and the case-law cited). See also, concerning the consequences as regards protection against removal that should be taken into consideration, the judgments in *Grzelczyk* (paragraph 43), and *Trojani* (paragraph 45), and also the analysis by Rondu, J., op. cit., especially p. 714, paragraph 902, which refers to the judgment of 13 September 2016, *CS* (C-304/14, EU:C:2016:674, paragraph 42). See, in particular, page 717, paragraph 907, footnotes 157 and 158.

[68] See the judgment in *Dano* (paragraphs 87, 90 and 91). The Court held that, since the conditions for the grant of special non-contributory cash benefits result neither from Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1) nor from Directive 2004/38 or from any other acts of EU secondary law, the Member States are competent to determine the conditions for granting it and its scope and that, consequently, they are not implementing EU law for the purposes of Article 51(1) of the Charter and that the Charter is not applicable.

[69] See paragraph 65 of that judgment.

residing on its territory are excluded from the benefit of social assistance enjoyed by the nationals of the host State, since they have a right of residence granted to them by that State in the context of the option offered in Article 37 of that directive.

85. Specifically, as the Court's case-law has confirmed, the benefit of such a right would have the effect of conferring unrestricted access to the social assistance enjoyed by nationals of the host State, as is the case for any Union citizen who derives his or her right of residence, in particular, from Article 7 of Directive 2004/38. [70]

86. However, to accept such an automatic application seems to me to go beyond the balance sought by the EU legislature in Directive 2004/38, clearly expressed in Article 24(2) thereof, especially when, as in the present case, the right of residence was granted to the Union citizen without conditions as to resources or social insurance. In other words, as the Commission emphasised orally, the fact that no conditions are imposed for the grant of a right of residence must not have the effect of obliging Member States to refrain from carrying out any check as regards entitlement to social benefits.

87. Furthermore, I observe that, when the Court has ruled on the compatibility with EU law of national legislation refusing to grant social assistance to economically inactive citizens, it has interpreted Article 24 of Directive 2004/38 as precluding their being excluded *in all circumstances and automatically*. [71]

88. It therefore seems to me that a distinction may be drawn, among Union citizens having a right of residence granted without conditions as to resources, between those who are economically inactive and the others. In addition, in this instance the information brought to the Court's notice concerning the diversity of the individual situations in which applications for Universal Credit may be made supports the need to exclude any mechanism for the systematic refusal of social assistance. [72]

89. It is for that reason that I consider that, in the case of a right of residence granted in more favourable conditions than those laid down in Directive 2004/38, that directive must be interpreted as allowing the host Member State to impose lawful restrictions on the grant of social benefits, [73] in order to ensure that 'persons exercising their right of residence should not … become an unreasonable burden on the social assistance system of the host Member State', within the meaning of recital 10 of that directive.

90. It must therefore be accepted that the possibility that there could exist, for Union citizens residing on the basis of a national right of residence, a difference in treatment between those who are economically inactive and the others would not be contrary to the principle of equal treatment laid down in Article 24(1) of Directive 2004/38, provided that that difference is not based on nationality. In fact, as stated in Article 18 TFEU, the principle of equal treatment, referred to in Article 24 of Directive 2004/38, means that the difference in treatment must not be based on nationality alone, but it does not aim to preclude its being based on objective criteria such as, in this instance, the economic activity of the Union citizen.

[70] See the judgment in *Dano* (paragraph 69).

[71] See the judgments in *Brey* (paragraphs 77 and 80), and also in *Jobcenter Krefeld* (paragraph 79).

[72] See, in that regard, the facts of the case pending in the United Kingdom referred to by CG, which are described in footnote 26 to this Opinion.

[73] See the judgment in *Brey* (paragraphs 72 and 77).

91. However, it must be ascertained whether that difference in treatment, in that it is based only on the citizen's economic activity, does not ultimately affect, by comparison with nationals of the host Member State, only, or in the vast majority of cases, Union citizens who are lawfully resident without conditions as to resources on its territory. In that situation, that difference in treatment would be classified as indirect discrimination on the ground of nationality. [74]

92. In this instance, as regards the conditions laid down in Regulation 9 of the 2019 Social Security Regulations for entitlement to Universal Credit, [75] I note that, in certain circumstances, economically active Union citizens cannot be refused Universal Credit on the ground of their pre-settled status and that certain United Kingdom nationals must prove their residence for the purposes of Regulation 9 in order to obtain that benefit. [76] A difference in treatment based directly on nationality can therefore in my view be discounted. However, by the very nature of the test applied, the legislation seems to me to affect nationals of other Member States more than 'home' nationals and may therefore disadvantage the former more particularly. Thus, that legislation creates, in my view, indirect discrimination on the ground of nationality. [77] However, that conclusion can be reached only after a thorough examination of the national legislation, which only the referring court is in a position to carry out.

93. Should it be concluded that there was indirect discrimination, I recall that, according to the Court's settled case-law, in order to be justified, such indirect discrimination must be appropriate for securing the attainment of a legitimate objective and cannot go beyond what is necessary to attain that objective. [78]

94. As regards the justification, based on the objective of protecting against the risk of an unreasonable burden being imposed on the public finances that States are required to produce, I would state only that, as the case-law now stands, although such justification is accepted in principle, [79] the Member States are not relieved of the requirement to substantiate their claims. [80]

95. In the present case, the United Kingdom chose to exclude certain Union citizens from access to social benefits solely because of the nature of the right of residence which that State granted them, namely pre-settled status.

96. Admittedly, the freedom of Member States to determine the conditions and the procedure for the grant of social assistance, set out in connection with non-contributory social benefits, in the absence of harmonisation, may be relied on. [81]

97. However, the systematic nature of the refusal of access to social assistance, without consideration of the individual situations of applicants, [82] which, moreover, were not examined when pre-settled status was granted, in the absence of any requirement that they be financially independent, does not seem to me to be proportionate to the objective pursued.

74 See, in particular, judgment of 13 April 2010, *Bressol and Others* (C-73/08, EU:C:2010:181 paragraph 41).

75 See point 27 of this Opinion.

76 That condition may not be satisfied by certain United Kingdom nationals who, for example, have lived abroad. See, concerning national legislation which does not make an exception for such a situation, judgment of 4 May 1999, *Sürül* (C-262/96, EU:C:1999:228, paragraphs 102 and 104).

77 See, by analogy, the judgment in *Commission* v *United Kingdom* (paragraph 78 and the case-law cited).

78 See the judgment in *Commission* v *United Kingdom* (paragraph 79 and the case-law cited).

79 See the judgment in *Commission* v *United Kingdom* (paragraph 80).

80 See the judgment in *Brey* (paragraph 78).

81 See the judgment in *Commission* v *United Kingdom* (paragraph 65 and the case-law cited).

82 See the judgment in *Commission* v *United Kingdom* (paragraph 81). See also the judgment in *Brey* (paragraph 77).

98. In those circumstances, I am of the view that the Court's answer, concerning the examination of the consequences of the lawfulness of residence, in the light of Article 24 of Directive 2004/38, should contain indications of the various elements that may be taken into account in order to satisfy the requirement of proportionality, following the example of its decision in the judgment in *Brey*.[83]

4. The requirement for individual decisions in social assistance matters

99. Like CG, I consider that her situation demonstrates the limits of the failure to carry out an individual examination before a decision is taken to exclude, or not to exclude, a Union citizen from the benefit of social assistance. Even though a number of points in common with the facts referred to in the judgment in *Dano* may be identified, the facts of the main proceedings have characteristics, highlighted more particularly at the hearing, which justify the development of the Court's case-law, irrespective of the solution adopted with regard to the concept of 'legal residence'.[84] In fact, those characteristics bring other fundamental rights into play, concerning which I shall explain my position below.

100. To my mind, it is important that, when they examine an application of an economically inactive Union citizen, the competent authorities of the host Member State may take into account, apart from the fact that they have granted that Union citizen a right of residence without checking whether he or she is financially independent, his or her family situation with respect to the conditions in which he or she moved to that Member State and the duration of his or her residence on its territory in so far as it reveals a definite degree of integration[85] and also the period over which the benefit applied for is likely to be paid to the applicant, in particular whether the difficulties which the beneficiary of the right of residence is facing are likely to be temporary.[86]

101. In the present case, it would be for the referring court, which alone has jurisdiction to assess the facts, to determine, in particular in the light of those elements, whether the grant of a subsistence allowance to a person in CG's situation is likely to represent an unreasonable burden for the national social assistance system. In that regard, I would make clear that, according to CG, examinations of individual situations would be carried out, in the context of actions brought by third-country nationals in order to obtain in certain circumstances the benefit of public funds.[87]

102. That examination will necessarily have to be carried out by reference to other fundamental rights applicable to the individual situation at issue, provided that if falls within the scope of Directive 2004/38.[88]

[83] See paragraph 78 of that judgment. See also judgment of 17 September 2002, *Baumbast and R* (C-413/99, EU:C:2002:493, paragraphs 91 and 92).

[84] I recall that it follows from the judgment in *Dano* (paragraph 81) that the Court did not consider it necessary to limit the situations in which an individual examination must be carried out.

[85] In that regard, I share the view expressed by the Commission that automatic exclusion from social assistance is particularly inappropriate in a case of residence for a relatively long period. See, by way of illustration, the situation of Ms Fratila described in footnote 26 to this Opinion.

[86] See the judgment in *Brey* (paragraph 72 and the case-law cited).

[87] According to CG's representative, this refers to third-country nationals whose right of residence was subject to the condition laid down in section 3(1)(c)(ii) of the Immigration Act 1971 that they will not have recourse to public funds when they apply to have that condition lifted when they consider that they are at risk of imminent destitution without recourse to public funds. Her written observations include references to the following two documents: 'Family life (as a partner or parent), private life and exceptional circumstances', Home Office (version 13.0, 1 February 2021), p. 88, and 'Immigration rules, Appendix FM: family members', GEN.1.11A. to the United Kingdom Immigration Rules.

[88] See point 81 of this Opinion.

5. Justification in the light of fundamental rights of the obligation to provide for an examination of individual situations

103. In my view, CG's situation calls for an analysis of the question of the restriction of access to social allowances in the light of the Court's decisions relating to fundamental rights other than the right to equal treatment, which goes beyond a general observation that subsistence benefits are intended to ensure that their recipients have the minimum means of subsistence necessary to lead a life in keeping with human dignity. [89]

104. In that regard, I note that CG travelled to the United Kingdom to follow her partner, a Netherlands national, when she was pregnant with their first child and financially dependent on him. She gave birth to a second child in the United Kingdom, of whom she now has care. [90] It may be inferred from CG's situation that the father does not contribute to the children's upkeep.

105. Those facts to my mind allow a comparison to be made with the decision taken by the Court in the judgment in *Chavez-Vilchez and Others* – although that case had as its subject matter the right of residence of third-country nationals in the Member State of which their children were nationals – for three reasons.

106. First of all, those situations are governed by legislation which falls, a priori, within the competence of the Member States. Next, they have, however, an intrinsic relationship with the freedom of movement and residence of a Union citizen. [91]

107. Last, the request for the interpretation of Article 20 TFEU referred to the Court was justified by the fact that it could not be excluded that the parent who was also a national of the same host Member State might be able to take charge of the primary day-to-day care of the child. [92]

108. On that occasion, the Court pointed out that it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in practice, to leave not only the territory of the Member State of which he or she is a national but also that of the European Union as a whole, as a consequence of such a refusal. [93] The Court held that, in order to assess the risk that a particular child, who is a Union citizen, might be deprived of the genuine enjoyment of the substance of the rights conferred on him or her by Article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the Member State concerned, although that parent was the primary carer of the child, the competent authorities were required to take account of the right to respect for family life, as stated in Article 7 of the Charter, a provision that had to be read in conjunction with the obligation to take into consideration the best interests of the child,

[89] See the judgment in *Jobcenter Krefeld* (paragraph 57). In that regard, apart from Article 1 of the Charter, Article 34(2) deserves special attention, since it establishes a link between the principles of freedom of movement and equal treatment in social assistance matters and is based, in particular, on Article 13 of the European Social Charter, signed in Turin on 18 October 1961, which the United Kingdom has accepted. Thus, I do not preclude that that provision may be of practical effect in a review of the lawfulness of the national measures that implement it or, at least, for the purpose of setting a framework for the assessment of equal treatment by the national court. See, to that effect, judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233, paragraphs 80 and 92).

[90] In her written observations, CG stated that her children have Netherlands nationality. CG's family situation is therefore comparable, in particular, to that of Ms H.C. Chavez-Vilchez, described in the judgment of 10 May 2017, *Chavez-Vilchez and Others* (C-133/15, EU:C:2017:354; 'the judgment in *Chavez-Vilchez and Others*'; paragraphs 21 and 22).

[91] See the judgment in *Chavez-Vilchez and Others* (paragraph 64).

[92] See the judgment in *Chavez-Vilchez and Others* (paragraph 59).

[93] See the judgment in *Chavez-Vilchez and Others* (paragraph 69 and the case-law cited).

recognised in Article 24(2) of the Charter.[94] The Court considered that the relationship of dependency between the third-country national parent and the child had to be assessed in a way that took into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his or her emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium.[95]

109. Consequently, the application of those principles seems to me to be capable of being transposed a fortiori, in matters relating to social assistance, especially where they serve to ensure a normal family life for Union citizens. It is then a matter of allowing the isolated and impoverished parent to meet his or her obligations towards his or her minor children, both for their health and security and in their relationship with their other parent, a Union citizen. As I see it, those principles provide ample justification for an individual examination of the situation of the Union citizen, an applicant for social assistance, who is lawfully resident in the host Member State.

110. For all of those reasons, I am of the view that by not providing that the competent authorities must carry out an assessment of all of the individual circumstances that characterise the situation of extreme poverty of the person concerned and of the consequences of a refusal of his or her application in consideration, according to his or her situation, of the right to respect for family life and of the best interests of the child, the national legislation goes beyond what is necessary to maintain the equilibrium of the social assistance scheme of the host Member State.

V. Conclusion

111. In the light of the foregoing considerations, I propose that the Court answer the questions for a preliminary ruling referred by the Appeal Tribunal for Northern Ireland (United Kingdom) as follows:

Article 24 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 must be interpreted as meaning that the legislation of a Member State under which an economically inactive national of another Member State who has a right of residence, granted without conditions as to resources in application of a national provision, is unable to receive social assistance solely because of the nature of his or her right of residence constitutes indirect discrimination on the ground of nationality and goes beyond what is necessary to maintain the equilibrium of the social assistance system of the host Member State if the refusal of such assistance has a greater effect on, or affects a greater number of, the nationals of other Member States than those of the host State – which it is for the referring court to ascertain – when that legislation does not require an examination of the individual circumstances that characterise the situation of the person concerned and does not require, in particular, that his or her situation of extreme poverty, the right to respect for family life and the best interests of his or her child be taken into account.

[94] See the judgment in *Chavez-Vilchez and Others* (paragraph 70).

[95] See the judgment in *Chavez-Vilchez and Others* (paragraph 71).