

## JUDGMENT OF THE COURT (Grand Chamber)

11 November 2014 ([\\*](#))

(Reference for a preliminary ruling — Free movement of persons — Citizenship of the Union — Equal treatment — Economically inactive nationals of a Member State residing in the territory of another Member State — Exclusion of those persons from special non-contributory cash benefits under Regulation (EC) No 883/2004 — Directive 2004/38/EC — Right of residence for more than three months — Articles 7(1)(b) and 24 — Condition requiring sufficient resources)

In Case C-333/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sozialgericht Leipzig (Germany), made by decision of 3 June 2013, received at the Court on 19 June 2013, in the proceedings

**Elisabeta Dano,**

**Florin Dano**

v

**Jobcenter Leipzig,**

THE COURT (Grand Chamber),

composed of V. Skouris, President, K. Lenaerts, Vice-President, A. Tizzano, L. Bay Larsen, T. von Danwitz, C. Vajda, S. Rodin, Presidents of Chambers, E. Juhász, A. Borg Barthet, J. Malenovský, E. Levits, M. Berger (Rapporteur) and J.L. da Cruz Vilaça, Judges,

Advocate General: M. Wathelet,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 18 March 2014,

after considering the observations submitted on behalf of:

- Ms Dano, by E. Steffen, Rechtsanwältin,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- the Danish Government, by C. Thorning, acting as Agent,
- Ireland, by M. Heneghan, T. Joyce and E. Creedon, acting as Agents, and C. Toland, Barrister-at-Law,
- the French Government, by D. Colas and C. Candat, acting as Agents,
- the Austrian Government, by G. Hesse, acting as Agent,
- the United Kingdom Government, by S. Behzadi-Spencer, acting as Agent, and J. Coppel QC,
- the European Commission, by F. Schatz, D. Martin, M. Kellerbauer and C. Tufvesson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 May 2014,

gives the following

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Article 18 TFEU, of point (a) of the first subparagraph, and the second subparagraph, of Article 20(2) TFEU, of Articles 1, 20 and 51 of the Charter of Fundamental Rights of the European Union ('the Charter'), of Articles 4 and 70 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum at OJ 2004 L 200, p. 1), as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) ('Regulation No 883/2004'), and of Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).
- 2 The request has been made in proceedings brought by Ms Dano and her son Florin against Jobcenter Leipzig concerning the latter's refusal to grant them benefits by way of basic provision ('Grundsicherung') that are envisaged by German legislation, namely, for Ms Dano, subsistence benefit ('existenzsichernde Regelleistung') and, for her son, social allowance ('Sozialgeld'), as well as a contribution to accommodation and heating costs.

### **Legal context**

#### *EU law*

#### Regulation No 1247/92

- 3 The first to eighth recitals in the preamble to Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1992 L 136, p. 1) state as follows:

'... it is necessary to amend Regulation (EEC) No 1408/71 ..., as updated by Regulation (EEC) No 2001/83 ..., as last amended by Regulation (EEC) No 2195/91 ...;

... it is necessary to extend the definition of "member of the family" in Regulation (EEC) No 1408/71 to conform with the case-law of the Court of Justice concerning the interpretation of that expression;

... it is also necessary to take account of the case-law of the Court of Justice stating that certain benefits provided under national laws may fall simultaneously within the categories of both social security and social assistance because of the class of persons to whom such laws apply, their objectives and their manner of application;

... the Court of Justice has stated that, in some of its features, legislation under which such benefits are granted is akin to social assistance in that need is an essential criterion in its implementation and the conditions of entitlement are not based upon the aggregation of periods of employment or contributions, whilst in other features it is close to social security to the extent that there is an absence of discretion in the manner in which such benefits as are provided thereunder are awarded and in that it confers a legally defined position upon beneficiaries;

... Regulation (EEC) No 1408/71 excludes from its scope, by virtue of Article 4(4) thereof, social assistance schemes;

... the conditions referred to and their methods of application are such that a system of coordination which differs from that currently provided for in Regulation (EEC) No 1408/71 and which takes account of the special characteristics of the benefits concerned should be included in that Regulation in

order to protect the interests of migrant workers in accordance with the provisions of Article 51 of the Treaty;

... such benefits should be granted, in respect of persons falling within the scope of Regulation (EEC) No 1408/71, solely in accordance with the legislation of the country of residence of the person concerned or of the members of his or her family, with such aggregation of periods of residence completed in any other Member State as is necessary and without discrimination on grounds of nationality;

... it is necessary nevertheless to ensure that the existing system of coordination in Regulation (EEC) No 1408/71 continues to apply to benefits which either do not fall within the special category of benefits referred to or are not expressly included in an Annex to that Regulation; ... a new Annex is needed for this purpose'.

#### Regulation (EC) No 883/2004

4 Regulation No 883/2004 replaced Regulation No 1408/71 from 1 May 2010.

5 Recitals 1, 16 and 37 in the preamble to Regulation No 883/2004 state:

'(1) The rules for coordination of national social security systems fall within the framework of free movement of persons and should contribute towards improving their standard of living and conditions of employment.

...

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

...

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

6 Article 1 of Regulation No 883/2004, headed 'Definitions', provides:

'For the purposes of this Regulation:

...

(1) "legislation" means, in respect of each Member State, laws, regulations and other statutory provisions and all other implementing measures relating to the social security branches covered by Article 3(1);

...

7 Article 2(1) of Regulation No 883/2004, relating to the persons covered by the regulation, provides:

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

8 Article 3 of Regulation No 883/2004, headed 'Matters covered', states:

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

...

(b) maternity and equivalent paternity benefits;

...

(h) unemployment benefits;

...

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

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

...

5. This Regulation shall not apply to:

(a) social and medical assistance ...’

9 Article 4 of Regulation No 883/2004, headed ‘Equality of treatment’, provides:

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

10 Chapter 9 of Title III of Regulation No 883/2004, relating to ‘Special non-contributory cash benefits’, contains Article 70, which is headed ‘General provision’ and provides:

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

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

(a) are intended to provide either:

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

or

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

and

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

and

(c) are listed in Annex X.

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

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

11 Annex X to Regulation No 883/2004, which is entitled 'Special non-contributory cash benefits', specifies the following benefits as regards the Federal Republic of Germany:

'...

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

Directive 2004/38

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

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

...

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

...

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

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

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

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

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

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

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

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

16 Article 14 of Directive 2004/38, headed ‘Retention of the right of residence’, provides:

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

2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

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

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

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

17 Article 24 of Directive 2004/38, headed ‘Equal treatment’, provides:

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

2. By way of derogation from paragraph 1, the host Member State shall not be obliged 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.’

### *German law*

## Social Code

18 Paragraph 19a(1) of Book I of the Social Code (Sozialgesetzbuch Erstes Buch; ‘SGB I’) sets out the two main types of benefit granted by way of basic provision for jobseekers:

- ‘(1) Under the entitlement to basic provision for jobseekers, the following may be claimed:
  - 1. benefits for integration into the labour market,
  - 2. benefits to cover subsistence costs.’

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

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

...

- (3) Basic provision for jobseekers encompasses benefits:

- 1. intended to bring to an end or reduce need, in particular by integration into the labour market, and
  - 2. intended to cover subsistence costs.’

20 Paragraph 7 of SGB II, headed ‘Beneficiaries’, provides:

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

- 1. have attained the age of 15 and have not yet reached the age limit referred to in Paragraph 7a,
  - 2. are fit for work,
  - 3. are in need of assistance and
  - 4. whose ordinary place of residence is in the Federal Republic of Germany (beneficiaries fit for work). The following are excluded:

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

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

...

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

...’

21 Paragraph 8 of SGB II, headed ‘Fitness for work’, states in subparagraph 1:

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

...’

22 Paragraph 9(1) of SGB II provides:

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

23 Paragraph 20 of SGB II sets out additional provisions on basic subsistence needs. Paragraph 21 of SGB II lays down rules on additional needs and Paragraph 22 lays down rules on accommodation and heating needs. Finally, Paragraphs 28 to 30 deal with education and participation benefits.

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

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

25 Paragraph 21 of SGB XII provides:

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

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

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

...

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

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

#### Law on freedom of movement of Union citizens

27 The scope of the FreizügG/EU is specified in Paragraph 1 of that law:

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

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

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

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

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

...

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

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

...

(4) Union citizens shall not require a visa in order to enter federal territory or a residence permit in order to reside there. ...

(5) In order for Union citizens to reside in federal territory for a period of up to three months, it is sufficient that they hold a valid identity card or passport. Family members who are not Union citizens have the same right if they hold an approved or otherwise accepted passport (or document in lieu of a passport) and they are accompanying or joining the Union citizen.

...

(7) The right under subparagraph 1 may be found not to exist if it is established that the person concerned has pretended that a condition for that right is fulfilled by using counterfeit or falsified documents or by misrepresentation of the facts. In the case of a family member who is not a Union citizen, the right under subparagraph 1 may also be found not to exist if it is established that he is not joining the Union citizen in order to establish or preserve family life or is not accompanying the Union citizen for that purpose. In these cases a family member who is not a Union citizen may be refused issue of the residence card or visa or his residence card may be withdrawn. Decisions under sentences 1 to 3 shall be in writing.'

29 Paragraph 3 of the FreizüG/EU, relating to family members, states:

'(1) Family members of the Union citizens specified in Paragraph 2(2), points 1 to 5, shall enjoy the right under Paragraph 2(1) if they are accompanying or joining the Union citizen. For family members of the Union citizens specified in Paragraph 2(2), point 5, this shall apply subject to Paragraph 4.

(2) The following are family members:

1. the spouse, the partner and the descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses or partners, who are not yet 21 years old,

2. the relatives in the ascending line and descendants of the persons specified in Paragraph 2(2), points 1 to 5 and 7, or of their spouses or partners, whom those persons or their spouses or partners maintain.

...'

30 Paragraph 4 of the FreizüG/EU provides, in relation to persons who are entitled to freedom of movement and are not working:

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

31 Paragraph 5 of the FreizüG/EU, headed 'Residence cards and certificate concerning the right of permanent residence', provides:

'...

(2) The competent aliens office may require that the conditions for the right under Paragraph 2(1) be substantiated within three months following entry into federal territory. Information and evidence necessary for substantiation may be received by the competent registration authority at the time of registration with it. That authority shall forward the information and evidence to the competent aliens office. The registration authority shall not use or process that data for any other purpose.

(3) A check to establish whether the conditions for the right under Paragraph 2(1) are fulfilled or continue to be fulfilled may be carried out where this is justified by a particular reason.

...'

32 Paragraph 5a of the FreizüG/EU states:

'(1) The competent authority may request a Union citizen to produce to it a valid identity card or passport in the circumstances referred to in Paragraph 5(2) and, in the circumstances referred to in

...

3. Paragraph 2(2), point 5, proof of sufficient sickness insurance cover and sufficient means of subsistence.'

33 Paragraph 6 of the FreizüG/EU, relating to loss of the right of entry and residence, states:

'(1) Without prejudice to Paragraph 2(7) and Paragraph 5(4), loss of the right under Paragraph 2(1) may be determined, and the certificate concerning the right of permanent residence, the residence card or the permanent residence card may be withdrawn, only on grounds of public policy, public security or public health (Articles 45(3) and 52(1) of the Treaty on the Functioning of the European Union). Entry may also be refused on the grounds referred to in the first sentence. ....

(2) The existence of a criminal conviction shall not in itself constitute a sufficient ground for the adoption of the decisions or measures referred to in subparagraph 1. Only criminal convictions which have not yet been deleted from the federal central register may be taken into account, and only in so far as the circumstances on which they are based disclose personal conduct that constitutes a present threat to the requirements of public policy. There must be a genuine and sufficiently serious threat affecting a fundamental interest of society.

(3) When a decision under subparagraph 1 is made, account must be taken in particular of how long the person concerned has resided in Germany, his age, his state of health, his family and economic situation, his social and cultural integration in Germany and the extent of his ties to his State of origin.

...

(6) Decisions or measures relating to loss of the right of residence or the right of permanent residence may not be adopted on economic grounds.

...'

34 As regards the obligation to leave the territory, Paragraph 7 of the FreizüG/EU states:

'(1) Union citizens and their family members shall be obliged to leave federal territory if the aliens office has established that there is no right of entry and residence. The decision shall contain a warning of removal from federal territory and set a time-limit for leaving it. Except in urgent cases the period set must be at least a month. ....

Union citizens and their family members who have lost their right to freedom of movement pursuant to Paragraph 6(1) may not re-enter federal territory and reside there. The prohibition under the first sentence shall, upon application, be for a fixed term. That term shall begin to run when federal territory is left. An application to have the prohibition lifted that is made after a reasonable period or after three years shall be determined within six months.'

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

- 35 Ms Dano, who was born in 1989, and her son Florin, who was born on 2 July 2009 in Saarbrücken (Germany), are both Romanian nationals. According to the findings of the referring court, Ms Dano last entered Germany on 10 November 2010.
- 36 On 19 July 2011, the city of Leipzig issued Ms Dano with a residence certificate of unlimited duration ('unbefristete Freizügigkeitsbescheinigung') for EU nationals, establishing 27 June 2011 as the date of entry into German territory. On 28 January 2013 it also issued her with a duplicate certificate.
- 37 Since their arrival in Leipzig, Ms Dano and her son have been living in the apartment of Ms Dano's sister, who provides for them materially.
- 38 Ms Dano receives child benefit ('Kindergeld') for her son Florin, which is paid by the Leipzig family benefits office on behalf of the Federal Employment Agency and amounts to EUR 184 per month. The Leipzig social assistance service for children and young people also pays an advance on maintenance payments of EUR 133 per month for that child, whose father's identity is not known.
- 39 Ms Dano attended school for three years in Romania, but did not obtain any leaving certificate. She understands German orally and can express herself simply in German. On the other hand, she cannot write in German and her ability to read texts in that language is only limited. She has not been trained in a profession and, to date, has not worked in Germany or Romania. Although her ability to work is not in dispute, there is nothing to indicate that she has looked for a job.
- 40 The first application that Ms Dano and her son submitted for the grant of benefits by way of basic provision under SGB II was refused by Jobcenter Leipzig by decision of 28 September 2011, on the basis of point 2 of the second sentence of Paragraph 7(1) of SGB II. Since that decision was not contested, it became final.
- 41 A fresh application for the same benefits, submitted on 25 January 2012, was also refused, by decision of Jobcenter Leipzig of 23 February 2012. Ms Dano and her son lodged an administrative objection against that refusal, relying on Articles 18 TFEU and 45 TFEU and on the judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344). That objection was dismissed by decision of 1 June 2012.
- 42 On 1 July 2012, Ms Dano and her son brought an action challenging that decision before the Sozialgericht Leipzig (Social Court, Leipzig), by which they again sought the grant of benefits by way of basic provision for jobseekers under SGB II in respect of the period commencing on 25 January 2012.
- 43 The Sozialgericht Leipzig considers that, by virtue of point 2 of the second sentence of Paragraph 7(1) of SGB II and Paragraph 23(3) of SGB XII, Ms Dano and her son are not entitled to benefits granted by way of basic provision. However, it expresses doubts as to whether provisions of EU law, in particular Article 4 of Regulation No 883/2004, the general principle of non-discrimination resulting from Article 18 TFEU and the general right of residence resulting from Article 20 TFEU, preclude those provisions of German law.
- 44 According to the findings of the referring court, the main proceedings concern persons who cannot claim a right of residence in the host State by virtue of Directive 2004/38.
- 45 In those circumstances, the Sozialgericht Leipzig decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:
- ‘(1) Do persons who do not wish to claim payment of any benefits of social security law or family benefits under Article 3(1) of Regulation No 883/2004 but rather special non-contributory benefits under Article 3(3) and Article 70 of the regulation fall within the scope *ratione personae* of Article 4 of the regulation?’

- (2) If Question 1 is answered in the affirmative: are the Member States precluded by Article 4 of Regulation No 883/2004, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of the regulation which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?
- (3) If Question 1 or Question 2 is answered in the negative: are the Member States precluded by (a) Article 18 TFEU and/or (b) [point (a) of the first subparagraph of Article 20(2)] TFEU in conjunction with the [second subparagraph] of Article 20(2) TFEU and Article 24(2) of Directive 2004/38/EC, in order to prevent an unreasonable recourse to non-contributory social security benefits under Article 70 of Regulation No 883/2004 which guarantee a level of subsistence, from excluding in full or in part Union citizens in need from accessing those benefits, which are provided to their own nationals who are in the same situation?
- (4) If, according to the answers to the abovementioned questions, the partial exclusion of benefits which guarantee a level of subsistence complies with EU law: may the provision of non-contributory benefits which guarantee a level of subsistence for Union citizens, outside acute emergencies, be limited to the provision of the necessary funds for return to the home State or do Articles 1, 20 and 51 of the Charter ... require more extensive payments which enable permanent residence?"

## **Consideration of the questions referred**

### *Question 1*

- 46 By its first question, the referring court asks, in essence, whether Article 4 of Regulation No 883/2004 must be interpreted as meaning that 'special non-contributory benefits' for the purposes of Articles 3(3) and 70 of the regulation fall within its scope.
- 47 A preliminary point to note is that the referring court has classified the benefits at issue in the main proceedings as 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004.
- 48 It must be pointed out, first, that Article 3 of Regulation No 883/2004 defines the matters covered by the regulation, expressly stating in Article 3(3) that the regulation 'shall also apply to the special non-contributory cash benefits covered by Article 70 [of the regulation]'.
- 49 Accordingly, it is clear from the wording of Article 3 of Regulation No 883/2004 that the regulation applies to special non-contributory cash benefits.
- 50 Second, Article 70(3) of Regulation No 883/2004 provides that Article 7 of the regulation, which governs the waiving of residence rules, and the other chapters of Title III thereof, which is devoted to the various categories of benefits, are not to apply to special non-contributory cash benefits.
- 51 Whilst Article 70(3) of Regulation No 883/2004 therefore, by way of exception, renders certain of the regulation's provisions inapplicable to special non-contributory cash benefits, Article 4 is not among those provisions.
- 52 Finally, the interpretation that Article 4 of Regulation No 883/2004 applies to special non-contributory cash benefits corresponds to the intention of the EU legislature, as is apparent from the third recital in the preamble to Regulation No 1247/92 which amended Regulation No 1408/71, inserting provisions relating to benefits of this type in order to take account of the case-law in that regard.
- 53 In accordance with the seventh recital, such benefits should be granted solely in accordance with the legislation of the Member State of residence of the person concerned or of the members of his or her family, with such aggregation of periods of residence completed in any other Member State as is necessary and without discrimination on grounds of nationality.

- 54 The specific provision which the EU legislature thus inserted into Regulation No 1408/71 by means of Regulation No 1247/92 is thus characterised by non-exportability of special non-contributory cash benefits as the counterpart of equal treatment in the State of residence.
- 55 In the light of all the foregoing considerations, the answer to the first question is that Regulation No 883/2004 must be interpreted as meaning that ‘special non-contributory cash benefits’ as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.
- Questions 2 and 3*
- 56 By its second and third questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 18 TFEU, Article 20(2) TFEU, Article 24(2) of Directive 2004/38 and Article 4 of Regulation No 883/2004 must be interpreted as precluding legislation of a Member State under which nationals of other Member States who are not economically active are excluded, in full or in part, from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Regulation No 883/2004 although those benefits are granted to nationals of the Member State concerned who are in the same situation.
- 57 It should be observed first of all that Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union (judgment in *N.*, C-46/12, EU:C:2013:9725, paragraph 25).
- 58 As the Court has held on numerous occasions, the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope *ratione materiae* of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (judgments in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31; *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 28; and *N.*, EU:C:2013:9725, paragraph 27).
- 59 Every Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope *ratione materiae* of EU law. These situations include those relating to the exercise of the right to move and reside within the territory of the Member States conferred by point (a) of the first subparagraph of Article 20(2) TFEU and Article 21 TFEU (see judgment in *N.*, EU:C:2013:97, paragraph 28 and the case-law cited).
- 60 In this connection, it is to be noted that Article 18(1) TFEU prohibits any discrimination on grounds of nationality ‘[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein’. The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised ‘in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder’. Furthermore, under Article 21(1) TFEU too the right of Union citizens to move and reside freely within the territory of the Member States is subject to compliance with the ‘limitations and conditions laid down in the Treaties and by the measures adopted to give them effect’ (see judgment in *Brey*, C-140/12, EU:C:2013:565, paragraph 46 and the case-law cited).
- 61 Thus, the principle of non-discrimination, laid down generally in Article 18 TFEU, is given more specific expression in Article 24 of Directive 2004/38 in relation to Union citizens who, like the applicants in the main proceedings, exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation No 883/2004 in relation to Union citizens, such as the applicants in the main proceedings, who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation.
- 62 Accordingly, the Court should interpret Article 24 of Directive 2004/38 and Article 4 of Regulation No 883/2004.
- 63 It must be stated first of all that ‘special non-contributory cash benefits’ as referred to in Article 70(2) of Regulation No 883/2004 do fall within the concept of ‘social assistance’ within the meaning of Article 24(2) of Directive 2004/38. That concept refers to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an

individual who does not have resources sufficient to meet his own basic needs and those of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State (judgment in *Brey*, EU:C:2013:565, paragraph 61).

- 64 That having been said, it must be pointed out that, whilst Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 reiterate the prohibition of discrimination on grounds of nationality, Article 24(2) of that directive contains a derogation from the principle of non-discrimination.
- 65 Under Article 24(2) of Directive 2004/38, the host Member State is not obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the period of seeking employment, referred to in Article 14(4)(b) of the directive, that extends beyond that first period, nor is it obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies to persons other than workers, self-employed persons, persons who retain such status and members of their families.
- 66 It is apparent from the documents before the Court that Ms Dano has been residing in Germany for more than three months, that she is not seeking employment and that she did not enter Germany in order to work. She therefore does not fall within the scope *ratione personae* of Article 24(2) of Directive 2004/38.
- 67 In those circumstances, it must be established whether Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 preclude refusal to grant social benefits in a situation such as that at issue in the main proceedings.
- 68 Article 24(1) of Directive 2004/38 provides that all Union citizens residing on the basis of the directive in the territory of the host Member State are to enjoy equal treatment with the nationals of that Member State within the scope of the Treaty.
- 69 It follows that, so far as concerns access to social benefits, such as those at issue in the main proceedings, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38.
- 70 First, in the case of periods of residence of up to three months, Article 6 of Directive 2004/38 limits the conditions and formalities for the right of residence to the requirement to hold a valid identity card or passport and, under Article 14(1) of the directive, that right is retained as long as the Union citizen and his family members do not become an unreasonable burden on the social assistance system of the host Member State (judgment in *Ziolkowski and Szeja*, C-424/10 and C-425/10, EU:C:2011:866, paragraph 39). In accordance with Article 24(2) of Directive 2004/38, the host Member State is thus not obliged to confer entitlement to social benefits on a national of another Member State or his family members during that period.
- 71 Second, for periods of residence longer than three months, the right of residence is subject to the conditions set out in Article 7(1) of Directive 2004/38 and, under Article 14(2), that right is retained only if the Union citizen and his family members satisfy those conditions. It is apparent from recital 10 in the preamble to the directive in particular that those conditions are intended, *inter alia*, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State (judgment in *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 40).
- 72 Third, it is apparent from Article 16(1) of Directive 2004/38 that Union citizens acquire the right of permanent residence after residing legally for a continuous period of five years in the host Member State and that that right is not subject to the conditions referred to in the preceding paragraph. As stated in recital 18 in the preamble to the directive, once obtained, the right of permanent residence is not to be subject to any conditions, with the aim of it being a genuine vehicle for integration into the society of that State (judgment in *Ziolkowski and Szeja*, EU:C:2011:866, paragraph 41).

- 73 In order to determine whether economically inactive Union citizens, in the situation of the applicants in the main proceedings, whose period of residence in the host Member State has been longer than three months but shorter than five years, can claim equal treatment with nationals of that Member State so far as concerns entitlement to social benefits, it must therefore be examined whether the residence of those citizens complies with the conditions in Article 7(1)(b) of Directive 2004/38. Those conditions include the requirement that the economically inactive Union citizen must have sufficient resources for himself and his family members.
- 74 To accept that persons who do not have a right of residence under Directive 2004/38 may claim entitlement to social benefits under the same conditions as those applicable to nationals of the host Member State would run counter to an objective of the directive, set out in recital 10 in its preamble, namely preventing Union citizens who are nationals of other Member States from becoming an unreasonable burden on the social assistance system of the host Member State.
- 75 It should be added that, as regards the condition requiring possession of sufficient resources, Directive 2004/38 distinguishes between (i) persons who are working and (ii) those who are not. Under Article 7(1)(a) of Directive 2004/38, the first group of Union citizens in the host Member State have the right of residence without having to fulfil any other condition. On the other hand, persons who are economically inactive are required by Article 7(1)(b) of the directive to meet the condition that they have sufficient resources of their own.
- 76 Therefore, Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens from using the host Member State's welfare system to fund their means of subsistence.
- 77 As the Advocate General has observed in points 93 and 96 of his Opinion, any unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is an inevitable consequence of Directive 2004/38. Such potential unequal treatment is founded on the link established by the Union legislature in Article 7 of the directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States.
- 78 A Member State must therefore have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence.
- 79 To deny the Member State concerned that possibility would, as the Advocate General has stated in point 106 of his Opinion, thus have the consequence that persons who, upon arriving in the territory of another Member State, do not have sufficient resources to provide for themselves would have them automatically, through the grant of a special non-contributory cash benefit which is intended to cover the beneficiary's subsistence costs.
- 80 Therefore, the financial situation of each person concerned should be examined specifically, without taking account of the social benefits claimed, in order to determine whether he meets the condition of having sufficient resources to qualify for a right of residence under Article 7(1)(b) of Directive 2004/38.
- 81 In the main proceedings, according to the findings of the referring court the applicants do not have sufficient resources and thus cannot claim a right of residence in the host Member State under Directive 2004/38. Therefore, as has been stated in paragraph 69 of the present judgment, they cannot invoke the principle of non-discrimination in Article 24(1) of the directive.
- 82 Accordingly, Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, does not preclude national legislation such as that at issue in the main proceedings in so far as it excludes nationals of other Member States who do not have a right of residence under Directive 2004/38 in the host Member State from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004.

83 The same conclusion must be reached in respect of the interpretation of Article 4 of Regulation No 883/2004. The benefits at issue in the main proceedings, which constitute ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of the regulation, are, under Article 70(4), to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. It follows that there is nothing to prevent the grant of such benefits to Union citizens who are not economically active from being made subject to the requirement that those citizens fulfil the conditions for obtaining a right of residence under Directive 2004/38 in the host Member State (see, to this effect, judgment in *Brey*, EU:C:2013:965, paragraph 44).

84 In the light of the foregoing, the answer to the second and third questions is that Article 24(1) of Directive 2004/38, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004 must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.

#### *Question 4*

85 By its fourth question, the referring court asks, in essence, whether Articles 1, 20 and 51 of the Charter must be interpreted as requiring the Member States to grant Union citizens non-contributory cash benefits by way of basic provision such as to enable permanent residence or whether those States may limit their grant to the provision of funds necessary for return to the home State.

86 It should be recalled that, in the context of a reference for a preliminary ruling under Article 267 TFEU, the Court is called upon to interpret EU law only within the limits of the powers conferred on the European Union (see, *inter alia*, judgment in *Betriu Montull*, C-5/12, EU:C:2013:571, paragraph 68 and the case-law cited).

87 Article 51(1) of the Charter states that the provisions of the Charter are addressed ‘to the Member States only when they are implementing Union law’.

88 According to Article 6(1) TEU, the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Likewise, the Charter, pursuant to Article 51(2) thereof, does not extend the field of application of EU law beyond the powers of the European Union or establish any new power or task for the European Union, or modify powers and tasks as defined in the Treaties (see judgment in *Åkerberg Fransson*, C-617/10, EU:C:2013:105, paragraphs 17 and 23, and order in *Nagy and Others*, C-488/12 to C-491/12 and C-526/12, EU:C:2013:703, paragraph 15).

89 In paragraph 41 of the judgment in *Brey* (EU:C:2013:565), the Court confirmed that Article 70 of Regulation No 883/2004, which defines the term ‘special non-contributory cash benefits’, is not intended to lay down the conditions creating the right to those benefits. It is thus for the legislature of each Member State to lay down those conditions.

90 Accordingly, since those conditions result neither from Regulation No 883/2004 nor from Directive 2004/38 or other secondary EU legislation, and the Member States thus have competence to determine the conditions for the grant of such benefits, they also have competence, as the Advocate General has observed in point 146 of his Opinion, to define the extent of the social cover provided by that type of benefit.

91 Consequently, when the Member States lay down the conditions for the grant of special non-contributory cash benefits and the extent of such benefits, they are not implementing EU law.

92 It follows that the Court does not have jurisdiction to answer the fourth question.

#### **Costs**

93 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

1. **Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010, must be interpreted as meaning that ‘special non-contributory cash benefits’ as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation.**
2. **Article 24(1) 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, read in conjunction with Article 7(1)(b) thereof, and Article 4 of Regulation No 883/2004, as amended by Regulation No 1244/2010, must be interpreted as not precluding legislation of a Member State under which nationals of other Member States are excluded from entitlement to certain ‘special non-contributory cash benefits’ within the meaning of Article 70(2) of Regulation No 883/2004, although those benefits are granted to nationals of the host Member State who are in the same situation, in so far as those nationals of other Member States do not have a right of residence under Directive 2004/38 in the host Member State.**
3. **The Court of Justice of the European Union does not have jurisdiction to answer the fourth question.**

[Signatures]

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\* Language of the case: German.