OPINION OF ADVOCATE GENERAL

WATHELET

delivered on 4 June 2015 (1)

Case C-299/14

Vestische Arbeit Jobcenter Kreis Recklinghausen

v

Jovanna García-Nieto,

Joel Peña Cuevas,

Jovanlis Peña García,

Joel Luis Peña Cruz

(Request for a preliminary ruling from the Landessozialgericht Nordrhein-Westfalen (Germany))

(Regulation (EC) No 883/2004 — Directive 2004/38/EC — Citizenship of the Union — Equal treatment — Union citizens seeking employment who reside in the territory of another Member State — Legislation of a Member State which excludes such persons from special non-contributory cash benefits — Existence of a genuine link between such citizens and the labour market of the Member State of residence)

I – **Introduction**

1. This request for a preliminary ruling essentially raises the question whether a Member State may exclude, for the first three months of their residence, nationals of other Member States who are not yet economically active and are in need of assistance from entitlement to non-contributory subsistence benefits as referred to in Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, (2) as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (3) ('Regulation No 883/2004').

2. This case is one of a series of cases referred by Germany in which the national courts question the compatibility with EU law, and in particular with the principle of equality established by various provisions of primary and secondary law, of the exclusion of certain Union citizens from entitlement to social benefits provided for by national legislation.

3. The first of these cases, which gave rise to the judgment in *Dano* (C-333/13, EU:C:2014:2358), concerned the situation of a Union citizen entering the territory of a Member State without intending to find a job there and without being in a position to support herself by her own means. The second case, in which I delivered an Opinion on 26 March 2015 (*Alimanovic*, C-67/14, EU:C:2015:210) and which is pending before the Court, concerns a Union citizen who, after working for less than a year in the territory of a Member State of which she was not a national, applied for subsistence benefits in the host Member State.

4. The present case presents a third type of situation, that of the Union citizen who, during the first three months of residence in the territory of a host State, is not a worker or self-employed person and cannot be regarded as having retained that status pursuant to Article 7(3) 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. (4)

II – **Legal framework**

A – *EU law*

1. The FEU Treaty

5. Under the first paragraph of Article 18 TFEU, '[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited'.

6. More specifically, Article 45 TFEU secures the freedom of movement of workers within the European Union. Paragraph 2 of Article 45 states that such freedom of movement 'shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

2. Regulation No 883/2004

7. The matters covered by Regulation No 883/2004 are set out in Article 3 thereof as follows:

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

…

(h) unemployment benefits;

…

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

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

…

5. This Regulation shall not apply to:

(a) social and medical assistance or

…'

8. 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.’

9. Chapter 9 of Title III of Regulation No 883/2004 deals with ‘[s]pecial non-contributory cash benefits’. It consists only of Article 70, which is entitled ‘General provision’, and provides:

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

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

(a) are intended to provide either:

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

or

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

and

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

and

(c) are listed in Annex X.

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

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such

benefits shall be provided by and at the expense of the institution of the place of residence.'

10. Annex X to Regulation No 883/2004, on '[s]pecial non-contributory cash benefits', contains, under the heading 'Germany', the following:

'…

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

3. Directive 2004/38

11. Recitals 10, 16 and 21 in the preamble to Directive 2004/38 are worded as follows:

'(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 job-seekers 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 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.'

12. 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.’

13. Article 7 of Directive 2004/38, entitled ‘Right of residence for more than three months’, provides:

‘1. 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; …

…

3. For the purposes of paragraph 1(a), a Union citizen who is no longer a worker or self-employed person shall retain the status of worker or self-employed person in the following circumstances:

…

(b) he/she is in duly recorded involuntary unemployment after having been employed for more than one year and has registered as a job-seeker with the relevant employment office;

(c) he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months;

…’

14. Article 14 of Directive 2004/38 is devoted to ‘[r]etention of the right of residence’. According to that provision:

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

…

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

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

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

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

15. Lastly, Article 24 of that directive, headed 'Equal treatment', states:

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

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

B – *German law*

1. The Social Code

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

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

1. benefits for integration into the labour market,

2. benefits to cover subsistence costs.'

…'

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

'(1) Basic provision [Grundsicherung] 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.'

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

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

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

2. who are fit for work,

3. who are in need of assistance, and

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

1. foreign nationals who are not workers or self-employed persons in … 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 members of their families,

…

Point 1 of the second sentence shall not apply to foreign nationals residing in … 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.

…’

19. Paragraph 8 of SGB II, devoted to the concept of ‘fitness for work’, provides:

‘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.

…’

20. Paragraph 9 of SGB II provides:

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

…’

21. Paragraphs 14 to 18e of SGB II, which form the first section of Chapter 3, concern benefits relating to integration into the labour market.

22. Paragraph 20 of SGB II sets out additional provisions on basic subsistence needs, Paragraph 21 of SGB II relates to additional needs and Paragraph 22 of SGB II concerns accommodation and heating needs. Lastly, Paragraphs 28 to 30 of SBG II deal with education and participation benefits.

23. 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 its beneficiaries to lead a life in keeping with human dignity. …’

24. 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. …’

2. The FreizügG/EU

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

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

26. 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,

…

(3) For workers and self-employed persons, the right provided for in subparagraph 1 is without prejudice:

…

2. to involuntary unemployment confirmed by the relevant office or termination of self-employment owing to circumstances beyond the control of the self-employed person, after more than one year of work,

…

The right derived from subparagraph 1 shall be retained for a period of six months in the event of involuntary unemployment confirmed by the relevant employment office after a period of employment of less than one year.

…’

27. Paragraph 4 of the FreizügG/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.’

3. The European Convention on Social and Medical Assistance

28. Article 1 of the European Convention on Social and Medical Assistance ('the Assistance Convention') provides for the principle of non-discrimination.

29. However, in accordance with Article 16(b) of the Assistance Convention, the German Government made a reservation ('the reservation') on 19 December 2011 stating that '[t]he Government of the Federal Republic of Germany does not undertake to grant to the nationals of the other Contracting Parties, equally and under the same conditions as to its own nationals, the benefits provided for in Book Two of the Social Code — Basic Income Support for Jobseekers — in the latest applicable version'.

III – **The facts of the case in the main proceedings**

30. The applicants in the main proceedings are Spanish nationals. For a number of years Ms García-Nieto and Mr Peña Cuevas lived together as a couple in Spain, without being married and without having entered into civil partnership, with their child Jovanlis Peña García and Mr Peña Cuevas's son, Joel Luis Peña Cruz, who is still a minor.

31. In April 2012, Ms García-Nieto entered the Federal Republic of Germany with their daughter, Jovanlis Peña García. She registered as a job-seeker on 1 June 2012 and approximately 10 days later started work as a kitchen assistant. From 1 July 2012 onwards she received a monthly net salary of EUR 600.00 (which was subject to social security contributions).

32. Shortly after, on 23 June 2012, Mr Peña Cuevas and his son Joel Luis Peña Cuevas joined them. Until 1 November 2012 all four applicants resided with Ms García-Nieto's mother and their living expenses were met from Ms García-Nieto's income.

33. Mr Peña Cuevas was employed for a short period of time, from 2 to 30 November 2012. Then, from 1 December 2012 to 1 January 2013, he received the unemployment benefit provided for under Book III of the Social Security Code, on the basis of the periods of insurance which he had completed in Spain. In January 2013 he took up employment as a cleaner and once that employment came to an end he again received unemployment benefit. In October 2013 he took up a new position of employment which, according to the order for reference, was due to come to an end on 30 September 2014.

34. Since July 2012 Ms García-Nieto and Mr Peña Cuevas have been receiving child benefits for the two children, who, moreover, have attended school since 22 August 2012.

35. On 30 July 2012 the applicants in the main proceedings applied to the Vestiche Arbeit Jobcenter Kreis Recklinghausen ('the Jobcenter') for the subsistence benefits provided for by SGB II.

36. The Jobcenter however refused to grant those benefits to Mr Peña Cuevas and his son Joel Luis Peña Cruz for the months of August and September 2012, basing its decision on point 1 of the second sentence of Paragraph 7(1) of SGB II and the fact that Mr Peña Cuevas and his son had resided in Germany for less than three months and that

Mr Pena Cuevas was neither a worker nor a self-employed person. According to the Jobcenter, the exclusion from entitlement to benefits applied equally to Mr Peña Cuevas's son. Following the reservation made by the German Government, no rights could arise under the Assistance Convention.

37. Following that refusal, the applicants in the main proceedings brought an action against the Jobcenter's decision before the Sozialgericht Gelsenkirchen (Social Court, Gelsenkirchen (Germany)), which was upheld. The Jobcenter nevertheless brought an appeal against that judgment before the Landessozialgericht Nordrhein-Westfalen (Higher Social Court of North-Rhine Westphalia).

38. It is in that context that the referring court questions the compatibility with EU law of the complete exclusion of the applicants in the main proceedings from entitlement to subsistence benefits.

IV – **The request for a preliminary ruling and the procedure before the Court**

39. By decision of 22 May 2014, received at the Court on 17 June 2014, the Landessozialgericht Nordrhein-Westfalen accordingly decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling under Article 267 TFEU:

'(1) Does the principle of equal treatment under Article 4 of Regulation [No 883/2004] — with the exception of the clause in Article 70(4) [thereof] excluding the provision of benefits outside the Member State of residence — apply also to the special non-contributory cash benefits referred to in Article 70(1) and (2) of Regulation [No 883/2004]?

(2) If the first question is answered in the affirmative: may the principle of equal treatment laid down in Article 4 of Regulation [No 883/2004] be limited by provisions of national legislation implementing Article 24(2) of Directive 2004/38 that do not in any circumstances allow access to those benefits for the first three months of their residence to Union citizens who are neither workers or self-employed persons in … Germany nor entitled to exercise freedom of movement under Paragraph 2(3) of the [FreizügG/EU] and, if so, to what extent may that principle be so limited?

(3) If the first question is answered in the negative: do the principles of non-discrimination enshrined in primary law — in particular by the combined provisions of Article 45(2) TFEU and Article 18 TFEU — preclude a provision of national legislation that does not in any circumstances allow the grant of a social benefit, intended to provide means of subsistence and to facilitate access to the labour market, in their first three months of residence to Union citizens who are neither workers or self-employed persons in [Germany] nor entitled to exercise freedom of movement under Paragraph 2(3) of the FreizügG/EU, but who can demonstrate a genuine link to the host [Member] State and, in particular, to the labour market of that host [Member] State?'

40. By decision of 19 March 2015, the Landessozialgericht Nordrhein-Westfalen decided that there was no need for the first question to be answered, since it had been asked in similar terms in the case which gave rise to the judgment in *Dano* (C-333/13, EU:C:2014:2358) and the Court had answered in the affirmative, holding that 'Regulation No 883/2004 [had to] 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'. (5)

41. Written observations were submitted by the applicants in the main proceedings, the German, Polish and United Kingdom Governments and the European Commission.

42. With the exception of the Polish Government, those parties all also presented oral argument at the hearing on 22 April 2015. The French Government, which had not submitted written observations, was also able to put forward its arguments at the hearing.

V – **Analysis**

A – *Preliminary observations regarding the classification of the subsistence benefits provided for by the national legislation*

43. By its second question, the referring court asks whether limitations on the principle of equal treatment referred to in Article 4 of Regulation No 883/2004 imposed by national legislation implementing Article 24(2) of Directive 2004/38 are consistent with EU law and, if so, to what extent.

44. With this question, the referring court weighs point 1 of the second sentence of Paragraph 7(1) of SGB II against Article 24(2) of Directive 2004/38, which lays down a derogation from the principle of equal treatment as between nationals of a host Member State and Union citizens in the grant of 'social assistance'.

45. An examination of the consistency of the national provision with Article 24(2) of Directive 2004/38 is therefore only relevant if the benefits at issue may be classified as 'social assistance' within the meaning of that directive.

46. The Court has already held that a special non-contributory cash benefit within the meaning of Regulation No 883/2004 could also be covered by the concept of 'social assistance system' as used in Article 7(1)(b) of Directive 2004/38. (6) However, if such financial benefits are intended to facilitate access to the labour market, they cannot then be regarded as constituting 'social assistance', within the meaning of Article 24(2) of Directive 2004/38. (7) They would, in that case, fall within the scope of Article 45 TFEU, which is central to the third question referred.

47. Consequently, according to the nature of the benefits at issue in the main proceedings, only the second or the third question referred by the national court need be answered.

48. I have already addressed this question at length in my Opinions in *Dano* (8) and *Alimanovic*, (9) in which I reached the conclusion that the subsistence benefits provided for by the SGB II fell within the definition of social assistance benefits within the meaning of Directive 2004/38. (10)

49. It seems to me that the Court itself has regarded subsistence benefits under the SGB II as social assistance benefits within the meaning of Directive 2004/38. Indeed, in paragraph 69 of its judgment in *Dano* (C-333/13, EU:C:2014:2358), the Court held 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'. (11) The benefits at issue in that case were identical to those which the Jobcenter refused to award the applicants in the main proceedings in this case.

50. Consequently, if the principle of the judgment in *Vatsouras and Koupatantze* (12) that financial benefits intended to facilitate access to the labour market cannot be regarded as constituting social assistance within the meaning of Article 24(2) of Directive 2004/38 (13) is not to be reversed, I must focus my analysis on Article 24(2) of Directive 2004/38 and not on Article 45(2) TFEU.

51. Nevertheless, for the sake of completeness, I shall also consider that last provision and the answer to be given to the third question referred for a preliminary ruling in the event that the Court decides that it is for the national court to classify the benefits at issue as social assistance benefits or as benefits intended to facilitate access to the labour market, or indeed as pursuing both those objectives.

52. In that context, should the national court find that the benefits claimed pursue a twofold objective of ensuring that basic needs are met, on the one hand, and of facilitating access to the labour market, on the other, I take the view that the decision must be based on the predominant function of the benefits, which, in the present case, is, unquestionably, to cover the subsistence costs necessary to lead a life in keeping with human dignity.

B – *The second question*

53. Under Article 24(2) of Directive 2004/38, '[a] 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)', that is to say, the period of seeking employment for Union citizens who have entered the territory of the host Member State for that purpose and who 'may not [therefore] be expelled for as long as [they] can provide evidence that they are continuing to seek employment and that they have a genuine chance of being engaged'.

54. Consequently, although '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*'. (14)

55. With regard to the first three months referred to in that provision, in its judgment in *Dano* (C-333/13, EU:C:2014:2358), the Court confirmed earlier case-law according to which, '[i]n accordance with Article 24(2) of Directive 2004/38, the host Member State is … not obliged to confer entitlement to social benefits on a national of another Member State or his family members during that period'. (15) That case-law may now be regarded as settled. (16)

56. In addition, with respect to the rights of nationals of Member States seeking employment in another Member State, that is to say, the second period referred to in Article 24(2) of Directive 2004/38, the Court has already held that its examination with regard to the principle of non-discrimination had not 'disclosed any factor capable of affecting [its] validity'. (17)

57. In fact, 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 [on account of] 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'. (18)

58. Accordingly, the principle of legislation of a Member State, such as that at issue in the case in the main proceedings, which excludes from entitlement to a special non-contributory cash benefit, within the meaning of Regulation No 883/2004 (and one which, moreover, constitutes social assistance within the meaning of Directive 2004/38), persons who move to the territory of that Member State in order to seek employment does not, in my view, run counter to Article 4 of Regulation No 883/2004 or to the system put in place by Directive 2004/38.

59. The overall legal framework of which Directive 2004/38 forms part does not call that conclusion into question.

60. In its judgment in *Dano* (C-333/13, EU:C:2014:2358), the Court noted '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:2013:97, paragraph 25)'. (19)

61. It then referred to its settled case-law, in accordance with which '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.*, C-46/12, EU:C:2013:97, paragraph 27)'. (20)

62. It follows from that case-law that '[e]very 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.*, C-46/12, EU:C:2013:97, paragraph 28 and the case-law cited)'. (21)

63. The Court further added that, '[i]n 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)'. (22)

64. Finally, the Court concluded that '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 … 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 … who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation'. (23)

65. In other words, Article 24(2) of Directive 2004/38, which authorises differences in treatment between Union citizens and the nationals of the host Member State, is a 'derogation from the principle of equal treatment provided for in Article 18 TFEU, of which Article 24(1) of [that] directive … is merely a specific expression'. (24) Therefore, it must be 'interpreted narrowly and in accordance with the provisions of the Treaty, including those relating to citizenship of the Union and the free movement of workers'.

66. Moreover, restrictions on the grant of social benefits to Union citizens who have not, or no longer have, worker status, that are established on the basis of Article 24(2) of Directive 2004/38, must be legitimate. (25)

67. Those considerations and the rules according to which, first, exceptions must be interpreted restrictively and, secondly, the resulting limitations must be legitimate led me, in my Opinion in *Alimanovic* (C-67/14, EU:C:2015:210), to propose that a distinction be drawn between three situations:

– that of the national of a Member State who moves to the territory of another Member State and stays there for less than three months, or for more than three months but without pursuing the aim of seeking employment there (the first situation);

– that of the national of a Member State who moves to the territory of another Member State to seek employment there (the second situation); and

– that of the national of a Member State who has stayed in the territory of another Member State for more than three months and who has worked there (the third situation).

68. The situation of the applicants in the main proceedings falls within the first part of the first of these situations (that of a national of a Member State who moves to the territory of another Member State and stays there for less than three months) and also within that described in the second situation (that of a national of a Member State who moves to the territory of another Member State to seek employment there).

69. As I have already had occasion to point out, the Court confirmed in the judgment in *Dano* (C-333/13, EU:C:2014:2358) that, '[i]n accordance with Article 24(2) of Directive 2004/38, the host Member State is … not obliged to confer entitlement to social benefits on a national of another Member State or his family members [for periods of residence of up to three months]'. (26)

70. That interpretation is consistent with the objective of maintaining the financial equilibrium of the social security system of the Member States pursued by Directive 2004/38. (27) Since the Member States cannot require Union citizens to have sufficient means of subsistence and personal medical cover for a three-month stay, it is legitimate not to require Member States to be responsible for them during that period.

71. Otherwise, granting entitlement to social assistance to Union citizens who are not required to have sufficient means of subsistence could result in relocation en masse liable to create an unreasonable burden on national social security systems.

72. Moreover, while persons arriving in a host Member State may have personal links with other Union citizens already residing there, the link with the Member State itself is nevertheless in all likelihood limited during that initial period.

73. Furthermore, I also observed, in the context of my analysis of the second situation envisaged in my Opinion in *Alimanovic* (C-67/14, EU:C:2015:210), that it is clear from the case-law of the Court that 'Member State nationals who move in search [of] work benefit from the principle of equal treatment only as regards *access to employment*, [whereas] those who have already entered the employment market may, on the basis of Article 7(2) of Regulation [(EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, (28) replaced by Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (29)], claim the same social and tax advantages as national workers'. (30)

74. In the light of the grounds of the judgment in *Dano* (C-333/13, EU:C:2014:2358) concerning the balance sought by Directive 2004/38 (31) and of the distinction drawn in EU law and in the Court's case-law between the worker who arrives in the territory of a Member State and the worker who has already entered the labour market there, the legislation of a Member State, such as that at issue in the main proceedings, which excludes from entitlement to a special non-contributory cash benefit, within the meaning of Regulation No 883/2004 (and one which, moreover, constitutes social assistance within the meaning of Directive 2004/38), for the first three months of their stay or for a longer period if they are seeking employment, persons who move to the territory of that Member State, does not, in my view, run counter to Article 4 of that regulation or to the system established by that directive.

75. That exclusion is consistent, not only with the wording of Article 24(2) of Directive 2004/38, which authorises the Member States to refuse to grant social assistance to nationals of the other Member States for the first three months, and longer if they have entered the territory of the host Member State to seek employment, but also with the objective difference — established in the case-law of the Court and, inter alia, in Article 7(2) of Regulation No 492/2011 — between the situation of nationals seeking their first job in the territory of the host Member State and that of those who have already entered the labour market there. (32)

76. Equally, legal literature on the interpretation of Directive 2004/38 and Regulation No 883/2004 does not, it seems to me, call that conclusion into question, even when read in the wider context of European citizenship, as enshrined in Articles 18 TFEU, 20 TFEU and 21 TFEU. (33)

77. Nor indeed does Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), which enshrines the right to respect for private and family life, home and communications, appear to me to be capable of affecting that analysis or altering my conclusion.

78. Indeed, not only is that article general in nature, but limitations may also be imposed on the rights which it protects, provided, in particular, that the principle of proportionality is observed, in accordance with Article 52(1) of the Charter. Just as the principle of equality is not fundamentally undermined by the derogation laid down in Article 24(2) of Directive 2004/38, neither is the right to family life that is enshrined in Article 7 of the Charter.

C – *The third question*

79. By its third question, the national court asks, in the event that the first question is answered in the negative, whether Article 45(2) TFEU and Article 18 TFEU in particular preclude national legislation that does not in any circumstances allow the grant to Union citizens whose right of residence arises solely out of the search for employment of social benefits that are intended both to provide a means of subsistence and to facilitate access to the labour market.

80. Whilst I propose that the first question should be answered in the affirmative, the third question would remain relevant if the Court were to decide that it is for the referring court to classify the basic provision benefits under EU law and the referring court were to take the view that those benefits are essentially intended to facilitate access to the labour market.

81. The Court has consistently held that it is 'no longer possible to exclude from the scope of Article [45(2) TFEU] — which expresses the fundamental principle of equal treatment, guaranteed by Article [18 TFEU] — a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State'. (34)

82. However, the Court has also held, in its judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344), that it is 'legitimate for a Member State to grant such an allowance only after it has been possible to establish a real link between the job-seeker and the labour market of that State'. (35)

83. According to consistent case-law, the existence of such a link may be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. (36)

84. Therefore, 'nationals of the Member States seeking employment in another Member State who have established real links with the labour market of that State can rely on Article [45(2) TFEU] in order to receive a benefit of a financial nature intended to facilitate access to the labour market'. (37)

85. Nevertheless, it must not be forgotten that the Court has already held that a single condition that is too general and exclusive in nature, in that it unduly favours an element not necessarily representative of the real and effective degree of connection between the claimant and the geographic market in question, to the exclusion of all other representative elements, goes beyond what is necessary in order to attain the aim pursued. (38)

86. I conclude from those two approaches that other factors in addition to the search for employment may be taken into consideration in assessing whether there is a real connection with the geographic market in question.

87. According to the Court, matters that can be inferred from family circumstances, such as the existence of close ties of a personal nature, are also such as to contribute to showing a lasting connection between the person concerned and the new host Member State. (39) Accordingly, national legislation establishing a condition that 'prevents other factors which are potentially representative of the real degree of connection of the claimant with the relevant geographic labour market being taken into account … goes beyond what is necessary to achieve its aim'. (40)

88. In light of the foregoing, it is contrary to EU law and, more precisely, to the principle of equal treatment enshrined in Article 45(2) TFEU for the legislation of a

Member State, such as that at issue in the main proceedings, automatically to exclude a citizen of the Union from entitlement to a special non-contributory cash benefit, within the meaning of Article 70(2) of Regulation No 883/2004 and which facilitates access to the labour market, for the first three months of his residence without allowing that citizen to demonstrate the existence of a genuine link with the host Member State.

89. The matters that can be inferred from family circumstances (such as the children's education or close ties, in particular of a personal nature, created by the claimant with the host Member State) (41) or the fact that the person concerned has, for a reasonable period, in fact genuinely sought work are factors capable of demonstrating the existence of such a link with the host Member State. (42) The fact of having worked in the past, or even the fact of having found a new job after applying for the grant of social assistance, ought also to be taken into account in this connection. (43)

90. However, it is not for the Court of Justice to determine in the context of a request for a preliminary ruling whether such a link exists, but for the competent national authorities, including the national courts, to do so.

VI – **Conclusion**

91. In light of the foregoing considerations, I propose that the Court should answer the questions referred by the Landessozialgericht Nordrhein-Westfalen as follows:

(1) 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 must be interpreted as not precluding legislation of a Member State which excludes from entitlement to certain 'special non-contributory cash benefits', within the meaning of Article 70(2) of Regulation (EC) No 883/2004 of the European Parliament and of the Council on the coordination of social security systems, as amended by Commission Regulation (EU) No 1244/2010, and which also constitute 'social assistance' within the meaning of Directive 2004/38, nationals of other Member States for the first three months of their residence in the host Member State.

(2) Article 45(2) TFEU precludes legislation of a Member State which excludes from entitlement to certain 'special non-contributory cash benefits', within the meaning of Article 70(2) of Regulation No 883/2004, as amended by Regulation No 1244/2010, and which facilitate access to the labour market nationals of other Member States for the first three months of their residence in the host Member State without giving them an opportunity to demonstrate the existence of a genuine link with the labour market of the host Member State.

1 – Original language: French.

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2 – OJ 2004 L 166, p. 1, and corrigendum in OJ 2004 L 200, p. 1.

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3 – OJ 2010 L 338, p. 35.

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4 – OJ 2004 L 158, p. 77, and corrigenda in OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34.

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5 – Paragraph 55 and point 1 of the operative part of the judgment.

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6 – Judgment in *Brey* (C-140/12, EU:C:2013:565, paragraph 58).

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7 – Judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 45).

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8 – C-333/13, EU:C:2014:341.

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9 – C-67/14, EU:C:2015:210, pending before the Court.

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10 – See points 65 to 72 of my Opinion in *Dano* (C-333/13, EU:C:2014:341) and points 54 to 58 of my Opinion in *Alimanovic* (C-67/14, EU:C:2015:210).

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11 – Emphasis added.

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12 – C-22/08 and C-23/08, EU:C:2009:344.

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13 – Ibid. (paragraph 45).

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14 – Judgment in *Dano* (C-333/13, EU:C:2014:2358, paragraph 64); emphasis added.

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15 – Paragraph 70.

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16 – See judgments in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraphs 34 and 35) and *Brey* (C-140/12, EU:C:2013:565, paragraph 56).

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17 – Judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 46). It is true that that finding of validity was made in the light of Articles 12 EC and 39(2) EC (now Articles 18 TFEU and 45(2) TFEU). However, since '[e]very Union citizen may … 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' (see judgment in *Dano*, C-333/13, EU:C:2014:2358, paragraph 59; emphasis added), it seems to me that the finding of the validity of Article 24(2) of Directive 2004/38 reached by the Court cannot be restricted exclusively to the situation of a 'worker' within the meaning of Article 45 TFEU.

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18 – Judgment in *Dano* (C-333/13, EU:C:2014:2358, paragraph 77).

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19 – Ibid. (paragraph 57).

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20 – Ibid. (paragraph 58).

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21 – Ibid. (paragraph 59).

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22 – Ibid. (paragraph 60).

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23 – Ibid. (paragraph 60); emphasis added.

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24 – Judgment in *N.* (C-46/12, EU:C:2013:97, paragraph 33).

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25 – See, to that effect, judgment in *Brey* (C-140/12, EU:C:2013:565, paragraph 57).

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26 – Paragraph 70.

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27 – See recital 10 in the preamble to that directive.

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28 – OJ, English Special Edition, 1968 (II), p. 475.

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29 – OJ 2011 L 141, p. 1.

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30 – Judgment in *Collins* (C-138/02, EU:C:2004:172, paragraphs 31 and 58 and the case-law cited).

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31 – Paragraphs 67 to 79.

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32 – Judgment in *Collins* (C-138/02, EU:C:2004:172, paragraphs 30 and 31).

33 – According to Herwig Verschueren, '[i]t seems that EU legislation also pursues this balanced approach in Directive 2004/38. This directive in fact lays down, in Article 24(2), a derogation from the principle of equal treatment in connection with social assistance during the first three months of residence ...' (Verschueren H., 'La libre circulation des personnes à l'intérieur de l'UE et les allocations sociales minimales des États membres: en quête d'équilibre, *Revue belge de sécurité sociale*, 1st quarter 2013, pp. 127 to 133, especially p. 127; see also p. 117). Marc Morsa also confirms that '[w]hile the right of residence is granted for a maximum of three months to all Union citizens without any other conditions or requirements than holding a valid identity card or passport (Article 6(1) of [Directive 2004/38]), Article 24(2) of Directive 2004/38 nevertheless allows host Member States not to confer entitlement to social assistance during the first three months of residence to persons who are not economically active, so that they do not become an unreasonable burden on the social assistance system of that Member State' (Morsa M., 'Les migrations internes à l'Union européenne sont-elles motivées par un accès à des prestations sociales? Citoyenneté européenne, liberté de circulation et de séjour des inactifs et droits sociaux, la relation entre la coordination européenne et la directive 2004/38', in *Journal des tribunaux du travail*, 2014, pp. 245 to 253, especially p. 251). Elaine Fahey draws attention to the choice of wording in Article 24: 'It will be recalled that Art. 24 of [Directive 2004/38], whilst providing for equal treatment of Union citizens to social assistance, expressly states that Member States do not have to extend the value of equal treatment to social assistance for work-seekers. This important derogation is contained in Art. 24(2) … The language used in the derogation consists of mandatory legislative language: "shall", as opposed to discretionary terminology such as "may", underscoring the fact that states are not under an obligation to provide assistance' (Fahey E., 'Interpretive legitimacy and the distinction between "social assistance" and "work-seekers' allowance": Comment on *Vatsouras*', E.L. Rev., 2009, 34(6), pp. 933 to 949, especially pp. 939 and 940; see also p. 946). Kay Hailbronner also confirms this unambiguous reading of Article 24 of Directive 2004/38: 'Article 24 unequivocally excludes job-seekers from social assistance for the first three months of residence or where appropriate for a longer period of job-seeking. *No exception is made for a genuine link to the employment market*' (emphasis added; Hailbronner K., 'Union citizenship and access to social benefits', CML Rev., 2005(42), pp. 1245 to 1267, especially p. 1263; see also the arguments set out on pp. 1259 and 1260).

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34 – Judgment in *Prete* (C-367/11, EU:C:2012:668, paragraph 25); see also, to that effect, paragraph 49 of the same judgment; judgments in *Collins* (C-138/02, EU:C:2004:172, paragraph 63); *Ioannidis* (C-258/04, EU:C:2005:559, paragraph 22); and *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 37).

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35 – Paragraph 38.

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36 – See, on this point, judgments in *Collins* (C-138/02, EU:C:2004:172, paragraph 70); *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 39); and *Prete* (C-367/11, EU:C:2012:668, paragraph 46).

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37 – Judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 40).

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38 – See, to that effect, judgment in *Prete* (C-367/11, EU:C:2012:668, paragraph 34 and the case-law cited).

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39 – Ibid. (paragraph 50).

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40 – Ibid. (paragraph 51).

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41 – See, to that effect, judgments in *Prete* (C-367/11, EU:C:2012:668, paragraph 50) and *Stewart* (C-503/09, EU:C:2011:500, paragraph 100).

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42 – At least with its labour market. See, in this connection, judgments in *Collins* (C-138/02, EU:C:2004:172, paragraph 70); *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 39); and *Prete* (C-367/11, EU:C:2012:668, paragraph 46).

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43 – See, in that regard, the Opinion of Advocate General Ruiz-Jarabo Colomer in Joined Cases *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:150), which emphasised the fact that the applicants in the main proceedings had engaged in economic activity with the first few months of their arrival in the host Member State. Given that particular circumstance, the Advocate-General took the view that it was difficult to

regard them ‘as ordinary job-seekers if they subsequently become unemployed’ (point 63).