

OPINION OF ADVOCATE GENERAL

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delivered on 12 March 2009¹

I — Introduction

1. The Sozialgericht (Social Court), Nuremberg, has referred three questions to the Court of Justice under Article 234 EC for a preliminary ruling on the interpretation of Article 12 EC and Article 39 EC, and on the validity of Article 24(2) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.² The referring court is seeking to ascertain whether a Greek national living in Germany — where he has worked for a short period — may, once the first three months of residence have elapsed, claim social assistance benefits whilst actively seeking employment.

social assistance, whilst Directive 2004/38, distancing itself from that case-law, prohibits the granting of assistance to those who have exercised freedom of movement and seek to work in another Member State. Restricting that right indefinitely means that benefits can be refused to individuals who, even though they are in search of work, already have such a link with the host country.

II — The facts

A — The action brought by Mr Vatsouras (Case C-22/08)

2. The uncertainty derives from the judgment in *Collins*,³ in which the Court of Justice introduced a requirement that job-seekers exercising the right to freedom of movement must demonstrate a ‘link’ with the host Member State in order to have access to

3. According to the order for reference, Athanasios Vatsouras, a Greek national, travelled to the Federal Republic of Germany in March 2006 and took up low-paid work. On 10 July 2006 his situation led him to apply to the Arbeitsgemeinschaft (social services agency, ‘the ARGE’) for subsistence benefits under the Sozialgesetzbuch Zweites Buch (Book II of the German Social Security

¹ — Original language: Spanish.

² — Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 (OJ 2004 L 158, p. 77), as corrected by corrigendum (OJ 2004 L 229, p. 35).

³ — Case C-138/02 *Collins* [2004] ECR I-2703.

Code), which were granted on 27 July 2006 in the amount of EUR 169 per month until 30 November 2006.

4. In January 2007 Mr Vatsouras lost his job. The assistance, which had been extended until 31 May 2007, was brought to an end with effect from 30 April 2007. Mr Vatsouras lodged an administrative objection against that decision, which was rejected on 4 July. Mr Vatsouras initiated proceedings before the courts contesting that rejection and it was during the course of those proceedings that one of the questions which are the subject of this reference arose.

5. It should be pointed out that Mr Vatsouras found new employment in Germany on 4 June 2007.

he was dismissed on 21 December owing to the financial difficulties of his employer. On the first day of his unemployment, Mr Koupatantze claimed unemployment benefit under the Sozialgesetzbuch Zweites Buch, and this was granted on 15 January 2007 with effect until 31 May 2007 in an amount of EUR 670 per month.

7. On 18 April 2007, for reasons which are not made clear in the order for reference, the ARGE brought Mr Koupatantze's social assistance to an end with retrospective effect from 28 February 2007. On 4 May, Mr Koupatantze filed an administrative objection against that decision, which was rejected a week later. On 16 May 2007, in accordance with German procedural law, Mr Koupatantze commenced judicial proceedings, during the course of which a question identical to that referred in Case C-22/08 arose.

B — *The action brought by Mr Koupatantze (Case C-23/08)*

6. A decision of the ARGE is also contested in the proceedings brought by Josif Koupatantze. The applicant, a Greek national, entered Germany in October 2006. He started working on 1 November and continued until

8. On 1 June 2007 Mr Koupatantze started new employment in Germany.

III — Legal framework

Article 18

A — *Community law*

9. Primary Community legislation covers the rights and obligations of European citizens who exercise their right to freedom of movement, and differentiates between them by reference to whether or not they pursue an economic activity. Articles 12, 18 and 39 EC are relevant in this respect:

1. Every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, subject to the limitations and conditions laid down in this Treaty and by the measures adopted to give it effect.

2. If action by the Community should prove necessary to attain this objective and this Treaty has not provided the necessary powers, the Council may adopt provisions with a view to facilitating the exercise of the rights referred to in paragraph 1. The Council shall act in accordance with the procedure referred to in Article 251.

‘Article 12

Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

3. Paragraph 2 shall not apply to provisions on passports, identity cards, residence permits or any other such document or to provisions on social security or social protection.

Article 39

The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination.

1. Freedom of movement for workers shall be secured within the Community.

2. 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.

embodied in implementing regulations to be drawn up by the Commission.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

4. The provisions of this Article shall not apply to employment in the public service.'

(a) to accept offers of employment actually made;

10. Article 7 of Directive 2004/38 on the free movement and right of residence of citizens of the Union and their family members sets out the conditions for residence in a Member State for a period longer than three months.

(b) to move freely within the territory of Member States for this purpose;

'Article 7

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

Right of residence for more than three months

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be

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

seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months.

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

...

...

11. In the area of social assistance, Directive 2004/38 limits the principle of non-discrimination on grounds of nationality in various ways with respect to persons residing in another Member State. Article 24(1) contains the statement of principle, while Article 24(2) sets out the restrictions.

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:

‘Article 24

...

Equal treatment

(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-

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.

B — *National law*

13. Paragraph 7(1) of Book II of the Sozialgesetzbuch ('the SGB') provides that,

'Paragraph 7

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.'

1. Under this Book benefits shall be received by persons who:

(a) have attained the age of 15 and have not yet attained the age of 65,

(b) are capable of earning a living,

12. The longer period provided for in Article 14 is a reference to the provision made for 'Union citizens [who] entered the territory of the host Member State in order to seek employment': such persons may not 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.

(c) are in need of assistance, and

(d) whose ordinary place of residence is in the Federal Republic of Germany.

Foreign nationals who have the right of residence only because they are seeking employment, their family members and persons entitled to benefits under Paragraph 1 of the Law on benefits for asylum-seekers are excluded. ...’

14. Paragraph 23(3) of Book XII of the SGB also states that, with respect to social assistance, foreign nationals who have entered Germany for the purpose of obtaining social benefits or of seeking employment are not entitled to assistance under the legislation.

IV — The questions referred for a preliminary ruling

15. Against that background, the Sozialgericht Nürnberg made two references to the Court of Justice on 22 January 2008 for a preliminary ruling under Article 234 EC on questions of validity and interpretation, setting out the same questions in both references:

‘(1) Is Article 24(2) of Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 compatible with Article 12 EC, read in conjunction with Article 39 EC?

(2) If the answer to Question 1 is in the negative, does Article 12 EC, read in conjunction with Article 39 EC, preclude national rules which exclude Union citizens from receipt of social assistance if the maximum period of residence permitted under Article 6 of Directive 2004/38 of the European Parliament and of the Council of 29 April 2004 has been exceeded and there is no right of residence under other provisions?

(3) If the answer to Question 1 is in the affirmative, does Article 12 EC preclude national rules which exclude nationals of Member States of the European Union even from receipt of the social assistance benefits which are granted to illegal immigrants?’

16. By order of 7 April 2008, the President of the Court of Justice ordered the two cases to be joined on account of the objective connection between them.

17. The Governments of Denmark, Germany, the Netherlands and the United Kingdom have submitted observations, as have the European Parliament, the Council and the Commission.

18. At the hearing on 4 February 2009, the agent for the United Kingdom, and the agents for the European Parliament, the Council and the Commission, presented their oral submissions.

V — A preliminary issue: the status of Mr Vatsouras and Mr Koupatantze as workers

19. The order for reference suggests that the applicants in the main proceedings may not be workers within the meaning of Article 39 EC. Because of the work in which they had been engaged, which was short-lived and poorly remunerated, it may be that Mr Vatsouras and Mr Koupatantze are not protected by virtue of the freedom of movement for workers but only under the non-discrimination rule laid down in Article 12 EC. However, that impression must be qualified and its implications carefully examined.

20. The views of the governments and Community institutions which have taken part in these proceedings diverge in this respect, with the Council and the Federal Republic of Germany maintaining that the applicants meet the conditions necessary for them to be regarded as workers, while Denmark argues the contrary; the Commission and the Netherlands, for their part,

submit that there is not sufficient information to enable a satisfactory conclusion to be reached and propose that the issue be left to the national court to decide. In view, also, of the ambivalence of the referring court,⁴ I believe that it is essential to mark out the parameters of the debate before addressing the questions referred.

21. The Court has always tried to prevent the scope of free movement and employees' rights from taking an independent course within each of the various Member States. Following the decision in *Unger*,⁵ it has formulated a specific Community definition of the term 'worker' in Article 39 EC and has defined an employment relationship as one which has the essential feature 'that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration'.⁶ The Court has subsequently made it clear that this statement must be interpreted broadly to cover a very wide range of occupations.⁷

22. In the present case, Mr Vatsouras and Mr Koupatantze have carried out duties which fall within that legal concept of an employment

4 — Although the *Sozialgericht Nürnberg* mentions several times the occasional nature of the work and the low pay received, its second question refers to Article 39 EC, which is clearly a reference to the free movement of workers.

5 — Case 75/63 *Hoekstra (née Unger)* [1964] ECR 177.

6 — Case 66/85 *Lawrie-Blum* [1986] ECR 2121, paragraphs 16 and 17; Case C-3/90 *Bernini* [1992] ECR I-1071, paragraph 14; and Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 15.

7 — Barnard, C., *EC Employment Law*, 3rd edition, Oxford University Press, Oxford, 2006, pp. 172 and 173.

relationship as developed by the case-law. However, there are two complicating factors when it comes to classifying them as workers: first, the short-lived and low-paid nature of the work and, secondly, the fact that it came to an end and was followed by economic inactivity. Both factors require careful consideration in order to ascertain whether the applicants are ‘workers’.

provided that the activity pursued as an employed person is genuine, the fundamental freedoms of individuals cannot be restricted, the motive underlying the search for employment being a matter of indifference to Community law; the decisive factor for the purposes of applying Article 39 EC is the nature of the work, viewed objectively, and not the amount of pay received by the worker.

A — *The short-lived and low-paid nature of the employment relationship*

23. In cases where the employment is minimal or so insignificant that it does not merit remuneration sufficient for subsistence, the case-law has developed a number of criteria for the application of Article 39 EC. In *Levin*,⁸ it was held that the *amount of remuneration* is not a critical factor in deciding the status of a person providing services for another. For it to be found that a worker falls within the scope of Article 39 EC, that person must be engaged in ‘effective and genuine activities, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary’.⁹ The case in *Levin* involved a British national who applied for a residence permit in the Netherlands, arguing that she was a part-time worker. It was inferred from the order for reference that the salary received by Ms Levin was below the amount necessary for her subsistence, but that did not prevent the Court from holding that,

24. Although in *Levin* the referring court was left to decide the particular case, subsequent case-law has shown that ‘effective and genuine activities’ can vary widely. Only exceptionally has an activity been held to be ‘purely marginal and ancillary’. In *Lawrie-Blum*,¹⁰ the question was whether the system of paid traineeships in a school, which were part-time and poorly remunerated, constituted a genuine and effective employment activity. The judgment emphasised that the trainees were workers covered by Article 39 EC, irrespective of whether the work was part of a training programme.¹¹ *Kranemann*¹² was a similar case which addressed the status of temporary civil servants who undergo practical legal training. The Court rejected the notion that, because the allowance paid to the individuals was merely assistance for meeting their minimum needs, Article 39 EC did not apply to them.

8 — Case 53/81 *Levin* [1982] ECR 1035.

9 — *Ibid.*, paragraph 17.

10 — *Lawrie-Blum*, cited in footnote 6.

11 — *Ibid.*, paragraph 19.

12 — Case C-109/04 *Kranemann* [2005] ECR I-2421.

The Court went on to state that a person's status as a worker under Community law cannot be affected by the limited amount of remuneration or the source of the funding.¹³

25. Nor is it the *duration* of the employment relationship which determines whether it is to be considered genuine and effective. It was first stated in *Levin*, mentioned above, that part-time contracts are not excluded from the scope of Article 39 EC. In *Ninni-Orasche*¹⁴ it was held that employment for two and a half months was sufficient to confer on the employee the status of Community worker. The referring court had expressed doubt as to the good faith of the person in question, citing a number of factors which indicated that she may have acted abusively, but the Court found that those factors were 'not relevant'¹⁵ and appraised only the genuine and effective nature of the employment.

26. By contrast, there are very few guidelines for interpreting the concept of 'marginal and

ancillary work'. The limits of Article 39 EC are illustrated only in *Raulin*¹⁶, in which it is indicated that the irregular nature and limited duration of the services actually performed under a contract for occasional employment must be taken into account.¹⁷ The fact that only a limited number of hours are worked is also an indication that the activities are marginal and ancillary.¹⁸ *Raulin*, however, concerned a seasonal contract which did not guarantee the number of hours of work. It was an unusual employment relationship which conferred only an *expectation* of work. It seems logical that, if a contract of this type had given rise only to a minimal amount of work, the requirement of 'genuine and effective' activity would not have been met.

27. It may therefore be inferred from the case-law that there is a tendency to interpret the concept of 'worker' in Article 39 EC broadly, to cover genuine and effective employment relationships of many different types. The fact that the employee may have manipulated the rules in order to achieve his objectives is irrelevant since only the objective elements of the employment relationship are assessed, and situations which are *obviously*

13 — Ibid., paragraph 17.

14 — Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187.

15 — This is very clearly expressed in paragraph 31 of the judgment: '... as regards the argument that the national court is under an obligation to examine, on the basis of the circumstances of the case, whether the appellant in the main proceedings has sought abusively to create a situation enabling her to claim the status of a worker within the meaning of Article 48 of the Treaty with the aim of acquiring advantages linked to that status, it is sufficient to state that any abusive use of the rights granted by the Community legal order under the provisions relating to freedom of movement for workers presupposes that the person concerned falls within the scope *ratione personae* of that Treaty because he satisfies the conditions for classification as a "worker" within the meaning of that article. It follows that the issue of abuse of rights can have no bearing on the answer to the first question.'

16 — Case C-357/89 *Raulin* [1992] ECR I-1027.

17 — Ibid., paragraph 14.

18 — Ibid.

marginal and difficult to reconcile with the concept of employment are set aside.¹⁹

28. Thus, Mr Vatsouras and Mr Koupatantze are workers who have been engaged in ‘genuine and effective activity’. Mr Vatsouras found a job when he arrived in Germany²⁰ and kept it for less than a year. He received EUR 169 per month in subsistence benefits. If that sum covered the difference between his pay and the average subsistence wage in Germany, it may be assumed that his pay was slightly lower than the minimum wage. The judgment in *Lawrie-Blum* was inconclusive as to whether temporary work paid at a daily rate lower than the minimum wage constituted a genuine and effective activity. However, if that judgment is read in conjunction with the *Ninni-Orasche* judgment, in which Article 39 EC was applied to an activity lasting a total of two and a half months, the argument for worker status acquires greater force. Remuneration which is *much lower* than a subsistence wage may mean that the work is to be considered irrelevant, but if it is *slightly* lower and, in addition, it continues for a year, there can be only one possible conclusion: that Mr Vatsouras must be recognised as having the status of ‘worker’, protected by Community law.

19 — The case-law on the EEC-Turkey Association Agreement takes a similar line in a series of cases applying the same approach to Turkish workers exercising the right of free movement. This broad interpretation of Article 39 EC is evident in Case C-1/97 *Birden* [1998] ECR I-7747, paragraph 25; Case C-188/00 *Kurz* [2002] ECR I-10691, paragraphs 33 and 34; and Case C-294/06 *Payir and Others* [2008] ECR I-203, paragraph 31.

20 — The precise date on which the employment commenced is not given, but it is to be supposed that, as he was granted social assistance on 10 July 2006, he started working shortly after arriving in Germany.

29. The case of Mr Koupatantze is similar. Here, it is not the amount of pay that is in question but the duration of the employment. As I have already mentioned, in *Ninni-Orasche* an employment relationship lasting two and a half months was considered sufficient. As long as there is genuine employment, albeit brief or poorly paid, the Court has no difficulty in applying Article 39 EC. Mr Koupatantze worked for barely two months. He did not become unemployed voluntarily or because his contract came to an end, but because of financial problems experienced by his employer. Furthermore, he never claimed subsistence benefits. As there is no indication that the employment undertaken by Mr Koupatantze was obviously marginal, he must be regarded as a worker protected under Article 39 EC.

B — *The termination of the employment relationship and the temporal scope of Article 39(3)(d) EC*

30. It remains to be determined whether the fact that both applicants lost their jobs can affect my line of argument. Article 39(3)(d) EC provides for the possibility that a worker may remain in the host Member State after having been employed there, but makes that option dependent on the fulfilment of certain unspecified conditions.²¹ Thus, job-seekers are not accorded the legal status conferred by Article 39 EC or the secondary legislation,

21 — Article 39(3)(d) EC states that the right to remain in the territory of a Member State after having been employed in that State is subject to ‘limitations justified on grounds of public policy, public security or public health’, and to conditions to be set out ‘in implementing regulations to be drawn up by the Commission’.

even though they are covered by the case-law in this area, which applies a hybrid system to persons who have lost their jobs but who are effectively seeking new employment.²²

they provided were not marginal or ancillary; furthermore, it has been shown that they began to seek work as soon as they became unemployed, which automatically results in a link arising and, for as long as they actively seek work, they are entitled to rely on the free movement of workers vis-à-vis the host Member State.

31. In *Collins*²³ it was accepted that Article 39 EC is fully applicable in the case of persons who had a link with the host Member State. In that case, 17 years had elapsed between the time when the applicant, an Irish national, had worked in the United Kingdom and his application for assistance in that country. On the basis of the previous case-law, the judgment in *Collins* developed the idea of the 'link' between the host Member State and the person exercising the right to free movement,²⁴ because, if a person has been a worker in the host Member State, that person should continue to be covered by Article 39 EC, even though he is technically no longer a worker.

32. On the basis of that premiss — and although it is for the referring court to clarify the facts — it is evident that Mr Vatsouras and Mr Koupatantze have been engaged in employment, through which they have acquired the status of workers within the meaning of Article 39 EC. The services that

VI — Analysis, in the light of that interpretation, of the questions referred for a preliminary ruling

33. In the light of the foregoing, I suggest that the Court should hold that the applicants in the main proceedings are, as the Council and the German Government have argued, workers protected under Article 39 EC.

34. The order for reference gives the impression that the Sozialgericht Nürnberg takes the contrary view and this attitude informs the question relating to the validity of Article 24(2) of Directive 2004/38.²⁵ That provision applies only to three groups, which fall outside the

22 — Case C-292/89 *Antonissen* [1991] ECR I-745; Case C-171/91 *Tsotras* [1993] ECR I-2925, paragraph 8; Case C-344/95 *Commission v Belgium* [1997] ECR I-1035, paragraph 15; and *Collins*, paragraph 26.

23 — Cited in the previous footnote.

24 — *Ibid.*, paragraphs 27 to 32.

25 — In Part III of the order for reference in Case C-22/08, the Sozialgericht Nürnberg argues that 'the applicant's brief minor employment, which did not ensure him a livelihood, had no subsequent effect on the right of residence, with the result that Article 24(2) of Directive 2004/38 must be applied to him'. Yet Article 24(2) of Directive 2004/38 does not apply to workers protected under Article 39 EC, even though it does apply to persons seeking employment. However, the referring court does not focus on the fact that the applicants are seeking work but on the brevity of the former employment and on the remuneration paid in respect of it.

scope of the protection conferred by Article 39 EC and the related secondary legislation: persons exercising their right to free movement during the first three months of residence; job-seekers; and students. In the case of the second of those groups, Article 39 EC applies in conjunction with Article 12 EC to create the hybrid system described in *Collins*.

35. Consequently, this is not a case in which it is appropriate to rely on Article 24(2) or to challenge its validity.

36. However, the second question referred for a preliminary ruling concerns the compatibility of the German legislation with Article 12 EC, read in conjunction with Article 39 EC. By that question, the Sozialgericht Nürnberg touches upon the relevance of the provisions on the free movement of workers. Thus, even though Article 12 EC can be ruled out in the case of workers, I would suggest that the Court should reply to the second question and restrict its analysis to the issue of the compatibility of the German law with Article 39 EC.

37. However, in case the Court should disagree with that proposal and take the view that the applicants are not workers, I will now, in the alternative and for the sake of

completeness, address the question of the validity of Article 24(2) of Directive 2004/38.

VII — The second question

38. The Sozialgericht Nürnberg directs its analysis to the fact that social assistance has been withdrawn on the ground that the maximum period of residence permitted under Directive 2004/38 has been exceeded. In other words, the Sozialgericht Nürnberg is uncertain as to the legality of a measure which disapplies the Community rules entirely where a person who has exercised the right to freedom of movement no longer satisfies the conditions for the exercise of that right. In the present case, Mr Vatsouras and Mr Koupatantze enjoyed the status of workers within the meaning of Article 39 EC, but when they became unemployed, their privileges, including the right to receive social assistance, were removed.

39. In addressing that point, the Commission relies, in its written observations, on Article 7(3)(c) of Directive 2004/38, which clearly covers the situation of the applicants in the main proceedings. Where a worker who has exercised the right to freedom of movement for a period of less than a year becomes involuntarily unemployed, Directive 2004/38 guarantees that person's employment status and, in consequence, the right of that person to reside in the host Member State, provided that the person has 'registered ... with the relevant employment office'. In those circum-

stances, the person retains his rights under Community law for no less than six months.

40. That provision provides confirmation that Article 39 EC is fully applicable to the present case. Although the applicants, having worked and resided for less than one year, do not have the link required by the case-law for their rights under the freedom of movement of persons to find their fullest expression, Directive 2004/38 has overcome this by imposing certain requirements designed to prevent abuse and to safeguard the stability of the public finances of host Member States.²⁶

41. The order for reference states that both Mr Vatsouras and Mr Koupatantze lost their jobs involuntarily before completing a full year of employment. It does not state whether they registered with an employment office, but if they did, Article 7 of Directive 2004/38 would come into play. It is for the referring court to look into this aspect.

26 — In the proposal for Directive 2004/38, the Commission justified Article 7 by stating that: 'These provisions define the conditions governing the exercise of the right of residence, [which is not an absolute right]. While the exercise of this right is to be facilitated, the fact that, at the present stage, social assistance provision is not covered by Community law and is not, as a rule, "exportable", entails that a completely equal treatment as regards social benefits is not possible without running the risk of certain categories of people entitled to the right of residence, in particular those not engaged in gainful activity, becoming an unreasonable [burden] on the public finances of the host Member State'.

42. On the assumption that the aforementioned conditions are satisfied, the German employment authorities, by depriving the applicants of the social assistance that they had been receiving, are in breach of Community law. If the reason for withdrawing the benefits (which, in the case of Mr Koupatantze, is not disclosed in the order for reference) is the loss of the right of residence as a result of unemployment, the German Government has restricted the free movement of workers, thus infringing both Article 39 EC and Article 7(2) of Regulation No 1612/68.²⁷ As workers, the applicants must receive the same treatment as any other German worker, even as regards work-related social measures. Mr Vatsouras is claiming assistance to cover the difference between his pay and the minimum subsistence wage. Mr Koupatantze, on the other hand, is claiming unemployment benefit because his employment has come to an end. Although these are different benefits, they relate to the status of worker enjoyed by both applicants.

43. Consequently, legislation which denies EU workers access to social assistance benefits when, after working for less than a year, they are unemployed and registered with an employment office is contrary to Article 39 EC.

27 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

VIII — The first question

44. If the Court of Justice does not share the view put forward in points 23 to 32 of this Opinion, it would be necessary to analyse the questions referred from a different perspective. If Mr Vatsouras and Mr Koupatantze are not ‘workers’ under Article 39 EC, then the question relating to the validity of Article 24(2) of Directive 2004/38 would take on its full significance, as the latter provision would be contrary to the way in which the case-law has interpreted Article 12 EC, read in conjunction with Article 39 EC, and applied to persons seeking work on the basis of freedom of movement.

45. The doubts expressed by the Sozialgericht Nürnberg go to the very heart of Directive 2004/38. As I have mentioned, Article 24(2) covers two distinct legal situations. The first situation is that of persons seeking maintenance aid, such as student grants or student loans — in other words, students exercising their right to free movement. The second situation is that of persons who settle in the territory of a Member State for three months or for such time as they need in order actively to seek work. The former are entitled to claim assistance of that kind only after they have acquired the right of permanent residence, which Directive 2004/38 confers after five years. The latter are granted ‘social assistance’ when they find work.

46. In *Förster*,²⁸ the Court found that the restriction imposed by Directive 2004/38 on students was compatible with Article 12 EC and Article 18 EC, but made no finding in relation to the validity of Article 24(2) of that directive, although it did make such a finding in relation to the Dutch legislation which preceded that Community rule. Thus, the Court ruled indirectly on the lawfulness of the restriction applying to students, but it remains to be determined whether Directive 2004/38 is compatible with the EC Treaty in its regulation of the situation of persons seeking employment without receiving social assistance.

47. All the Member States and Community institutions which have submitted observations in the present proceedings have argued in favour of the validity of Article 24(2) of Directive 2004/38, using broadly similar arguments. Of the reasons presented, there is one which seems to me to develop the idea first introduced in *Collins* and reflected in Directive 2004/38.

A — Article 24(2) of Directive 2004/38 and its relationship with the case-law of the Court of Justice

48. Mr Collins was claiming a jobseeker’s allowance in the United Kingdom. He had a

²⁸ — Case C-158/07 *Förster* [2008] ECR I-8507.

United States passport and, having completed his education there, he worked for a time in Great Britain and acquired Irish nationality. For 17 years he lived in the United States and in South Africa before returning to the United Kingdom to look for work, where he applied for the benefit in question.

tionate, in order to be sure that the national provisions are compatible with Community law.³¹

49. In the Opinion in that case, I argued in favour of a cautious interpretation of the case-law on citizenship in order to reconcile the prohibition on discrimination laid down in Article 12 EC, read in conjunction with Article 39 EC, with the risk of 'benefit tourism'.²⁹ To that end, I proposed that Mr Collins' claims should be dismissed on the grounds that the links with the Member State in which he sought to obtain the assistance were too weak.³⁰ I accepted, however, that persons who can show some connection with the host Member State are protected. That point was taken up by the Court, which, after analysing in paragraph 72 of the judgment the role played by a residence requirement in demonstrating such a link, added that the length of time 'must not exceed what is necessary in order for the national authorities to be able to satisfy themselves that the person concerned is genuinely seeking work in the employment market of the host Member State'. In short, it is for the host country to show that the period of residence is propor-

50. By contrast with the case of students, on whom Article 24(2) of Directive 2004/38 imposes a minimum period of residence of five years, the position regarding persons who are in search of work is more ambiguous. When it comes to setting a period which might constitute a link, that provision refers to Article 14(4)(b), which states that Member States cannot expel Union citizens or their family members if they have 'entered the territory of the host Member State in order to seek employment'. In those circumstances, no restriction is permitted for as long as the individuals concerned can provide evidence that they are 'continuing to seek employment and that they have a genuine chance of being engaged'.

29 — Points 64 and 65 of the Opinion.

30 — Paragraph 75.

31 — To that effect, see *Trojani*, paragraphs 42 to 45, and Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 29. On those two judgments and the requirement of a link, see Muir, E., 'Statut et droits du demandeur d'emploi-travailleur-citoyen: confusion ou rationalisation?', *Revue du Droit de l'Union Européenne*, 2, 2004, pp. 270 to 272; and O'Leary, S., 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship', *Yearbook of European Law*, Cambridge, 2008, pp. 185 and 186.

51. In the light of that legislative framework, the referring court perceives two possible interpretations of the contested provision.

52. On the one hand, the view might be taken that Article 24(2) of Directive 2004/38 permits a restriction for an unlimited period of time, so long as the citizen is trying to find work. If Article 14 prohibits expulsion where the person concerned is trying to obtain paid work, such a period of time, taken together with the literal terms of Article 24(2), would constitute a move away from *Collins*, as it would support a prohibition on access to social assistance irrespective of any link with the host Member State.

53. On the other hand, it could be argued that Article 24(2) makes an implied reference to the period necessary to obtain permanent residence, as in the case of students. So, five years after entering the territory of the Member State, a person who had continued trying to obtain work would be eligible for the assistance in question.

54. Neither of those two interpretations is convincing. The first fails to convince, because it obviously contradicts *Collins*,³² as an indefinite period offers no legal certainty and is inconsistent with the objectives of Directive 2004/38, which seeks to bring stability to a field of regulation which is very closely linked to the fundamental rights of the European citizen. The second, because it would not make sense for the directive to make a distinction between the status of students and the status of persons seeking employment and then to provide that they engender identical legal effects; if there were such a difference in status between those two groups of persons, it would be pointless for the provision to confer the same effects on both groups: such an interpretation would be out of line with what was intended when the legislation was adopted and would not stand up to rigorous analysis.

55. On the contrary, Directive 2004/38 is silent on this question precisely because it takes the approach that persons wishing to work are subject to a special regime which, after the first three months of residence, is not conditional on proving five years' residence, as in the case of students, and which does not place them in a legislative limbo whilst they

32 — It could be argued that Directive 2004/38 does not follow the approach taken in *Collins* because the legislation was adopted (on 29 April 2004) only a few days after the judgment was handed down (on 23 March 2004). However, I delivered the Opinion on 10 July 2003, when the proposal for a directive was in the process of being negotiated. I think it unlikely that when the institutions adopted the legislation they were unaware of the implications of the judgment of the Court of Justice.

attempt to find work. I am in agreement with the Council that the provision at issue does not provide a rigid criterion for determining the existence of the link required by *Collins*. Aware that persons seeking work are midway between being engaged in economic activity and not being so engaged, the directive leaves each national legislature free to find the appropriate balance.³³ It is ultimately for the Court of Justice to decide whether the national approaches comply with the Treaties and with Directive 2004/38; and that approach not only confirms the validity of Article 24(2) of the directive, but enables its provisions, in turn, to be interpreted in line with the case-law of the Court.

56. The United Kingdom argues that the fact that the assistance at issue takes the form of benefits specifically aimed at helping the recipient to join the labour market does not detract from that conclusion. It is sufficient that the allowance should assist entry into the world of work, provided that the applicant can demonstrate, as required by *Collins*, a link with the host Member State.³⁴ In fact, at the hearing, the agent for the United Kingdom

agreed that the assistance in question could be considered, in the light of more thorough analysis, a means of promoting integration into the labour market.

57. Thus, the objective of the assistance must be analysed *according to its results* rather than according to the formal structure of the benefit. Otherwise, it would be a simple matter to avoid the rule laid down in *Collins*: it would be sufficient merely to remove from the legislation governing the benefit all references to the fact that its purpose is to assist reintegration, and thus to deny that benefit to Community citizens exercising the right to free movement in order to seek employment. This approach leads me to take the view, despite the Commission's submissions, that there may be 'social assistance' measures, as contemplated in Article 24(2) of Directive 2004/38, which promote integration into the labour market. In those circumstances, *Collins* demands that Article 39 EC be applied and that social assistance be granted to persons seeking employment within the territory of the Union.

33 — Golynger, O, 'Jobseekers' rights in the European Union: challenges of changing the paradigm of social solidarity', *European Law Review*, 30, 2005, pp. 118 to 120; Barnard, C., *The Substantive Law of the EU*, 2nd edition, Oxford University Press, Oxford, 2007, p. 301; and Spaventa, E., *Free Movement of Persons in the European Union*, Kluwer, The Hague, 2007, p. 5.

34 — *Collins*, paragraph 68.

58. In the present case, we know that the function of the ARGE is to work towards reintegration into the labour market, because it was founded for the same purposes as the SGB II; the full name of the agency (Die

Arbeitsgemeinschaft zur Arbeitsmarktintegration Nürnberg) reflects the integration role that it plays.³⁵

59. At the end of the day, it is for the referring court to assess whether the assistance claimed serves that purpose.

B — Article 24(2) of Directive 2004/38 and its application in the present case

60. If the Court shares the view put forward in this Opinion, the reply to be given to the Sozialgericht Nürnberg would need to be based on the case-law rather than on the provision whose validity is under consideration. If national law can require that a link be shown between the host Member State and the person seeking work, the referring court must assess whether such a requirement meets the criteria set out in paragraph 72 of the judgment in *Collins*.

61. It can be inferred from the order for reference that the Federal Republic of Germany prohibits the granting of assistance to persons entering its territory in order to seek work.³⁶ The national legislation is based on the more restrictive view of Article 24(2) of the directive, which I have criticised above. The national provisions do not allow for an evaluation of any kind which might permit Mr Vatsouras and Mr Koupatantze to make a case for a link with German territory and, in consequence, the German legislation should be held incompatible with the EC Treaty, as interpreted by the Court in *Collins*.

62. In that regard, I think it is important to highlight a difference between the present case and that of Mr Collins, a Community citizen who was absent for 17 years and lost his link with the host Member State, whereas the applicants before the Sozialgericht Nürnberg went to Germany and rapidly found work there. Nevertheless, the Court could take the view that the work was ‘marginal and ancillary’, although employment — however modest — does show that the person is capable of entering into an employment relationship. In addition, Mr Vatsouras performed his duties for less than a year, which means that his move to Germany cannot be regarded as benefit tourism. In Mr Koupatantze’s case, although there is no

³⁵ — Nuremberg social services agency for integration into the labour market (http://www.nuernberg.de/schluesel/aemter_info/ref5/sha/arge.html).

³⁶ — Paragraph 7(1) of Book II and Paragraph 23(3) of Book XII of the Sozialgesetzbuch.

record of the type of work performed or the pay received, there is no indication that his work was fictitious, since it ended for reasons beyond his control. Furthermore, both men returned to work after their assistance was terminated, which is an indication that both were genuinely and effectively seeking work for a reasonable period.

has correspondingly greater chances of finding new work. It is for the referring court to ascertain whether the applicants in the present proceedings had established a link of that nature.

IX — The remaining questions

63. These factors are evidence that the applicants were in a better position to secure work because they had previously been in gainful employment. Anyone wishing to join the workforce has better credentials if they have carried out responsibilities with a wage-earning aspect of some kind in the past. In addition, if there has been some exchange of services for remuneration, however minimal, there is all the more reason to apply the EC Treaty. Consequently, in a case such as that of Mr Vatsouras and Mr Koupatantze, where there has been economic activity within the first few months of arrival in Germany, it is difficult to regard them as ordinary job-seekers if they subsequently become unemployed.

64. All of the above inclines me to the view that there is a link, within the meaning of *Collins*, where the person looking for work has previously been gainfully employed and

65. If the Court does not share the view that Mr Vatsouras and Mr Koupatantze are workers, my proposed interpretation of Article 24(2) of Directive 2004/38 would answer both the first and the second questions referred by the Sozialgericht Nürnberg.

66. In relation to the third question, Community law does not provide rules for resolving issues of difference in treatment between Community citizens and citizens of non-member countries who are subject to the law of the host Member State. Article 12 EC seeks to eliminate discrimination between Community citizens and nationals of the host Member State but does not offer guidelines for eliminating the discrimination complained of by the referring court. Consequently, the third question does not need to be addressed.

X — Conclusion

67. In accordance with the foregoing, I propose that the Court should reply as follows to the questions referred by the Sozialgericht Nürnberg:

- (1) Article 39 EC, read in conjunction with Article 7(3)(c) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004, is incompatible with national measures which deny EU workers access to social assistance benefits where, after working for less than one year, they are unemployed and duly registered with an employment office.
- (2) The analysis of the question referred for a preliminary ruling has not disclosed any factor which might affect the validity of Article 24(2) of Directive 2004/38 of the European Parliament and of the Council of 29 April 2004.
- (3) There is a link between a person in search of work and the host Member State where that person has previously been gainfully employed, thus increasing the chances of finding a new job. It is for the national court to ascertain whether the applicants in the main proceedings had established a link of that nature.