Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 29 May 2013 [1]

Case C-140/12

Peter Brey
v
Pensionsversicherungsanstalt

(Request for a preliminary ruling from the Oberster Gerichtshof (Austria))

(Citizenship of the Union — Freedom of movement for persons — Article 7(1)(b) of Directive 2004/38/EC — Right of residence for a period longer than three months on the territory of another Member State — Persons having ceased their professional activity — Conditions for residence — Application for a special non-contributory cash benefit ('Ausgleichszulage') — Notion of 'social assistance')

1. The idea that a Union citizen could say '*civis europeus sum*' and invoke that status against hardships encountered in other Member States was famously pioneered 20 years ago. [2] The present case raises the question whether that status can be relied upon today, against the economic difficulties of modern life.

2. This request for a preliminary ruling has been made by the Oberster Gerichtshof (Supreme Court) (Austria), which must rule at last instance on the entitlement of Mr Brey to a 'compensatory supplement' under Austrian legislation (Ausgleichszulage; 'the compensatory supplement'), which he has been refused by the Pensionsversicherungsanstalt (Pensions Insurance Institution). In particular, the referring court wishes to know whether the compensatory supplement constitutes social assistance for the purposes of Article 7(1)(b) of Directive 2004/38/EC (or 'the Directive'). [3]

3. Although the dispute concerns social law, the underlying issue is actually whether Mr Brey is lawfully resident in Austria, a requirement under Austrian law for entitlement to the compensatory supplement. Apparently, the Austrian Government is concerned about the growing number of inactive migrant Union citizens settling in Austria and applying for the compensatory supplement. [4] A compensatory supplement has previously been examined by the Court [5] in relation to Regulation (EEC) No 1408/71. [6] The referring court now wishes to know whether the compensatory supplement falls within the notion of 'social assistance' as used in the Directive.

1 — Original language: English.

2 — The Opinion of Advocate General Jacobs in Case C-168/91 *Konstantinidis* [1993] ECR I-1191, point 46.

3 — Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

4 — As to persons receiving both a foreign pension and the compensatory supplement, the Austrian Government refers to an increase from 498 in Q1 2009 to 764 in Q1 2011 and to 940 in Q1 2012.

5 — Case C-160/02 *Skalka* [2004] ECR I-5613.

6 — Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ English Special Edition 1971(II), p. 416), as amended.

I – Legal context

A – *EU legislation*

1. Directive 2004/38

4. Article 7(1)(b) of the Directive grants a right of residence in another Member State for periods of longer than three months for persons who are not workers, self-employed persons, or students, provided, inter alia, that they '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'.

5. Article 8(4) of the Directive prevents Member States from laying down a fixed amount to be regarded as 'sufficient resources' for the purposes of Article 7(1)(b), requiring instead that the personal situation of the person concerned be taken into account.

6. As for the retention of the right of residence, Article 14(2) of the Directive provides, inter alia, that Union citizens may continue to reside in the host Member State as long as they meet the conditions set out in Article 7. Where there is reasonable doubt as to whether a Union citizen satisfies those conditions, the host Member State may verify, in a non-systematic manner, that the conditions are fulfilled. Lastly, under Article 14(3), an expulsion measure cannot be the automatic consequence of recourse to the social assistance system of the host Member State.

2. Regulation No 883/2004

7. According to recital 1 in the preamble to Regulation No 883/2004[7] ('the Regulation'), the rules for the coordination of national social security systems fall within the framework of freedom of movement for persons. However, recital 4 underlines the need to respect the special characteristics of national social security legislation and to draw up only a system of coordination. By virtue of Article 3(5)(a), social assistance is excluded from the scope of the Regulation.

8. Nevertheless, by virtue of Article 3(3), the Regulation applies to the special non-contributory cash benefits that fulfil the criteria listed in Article 70. The reason for this is that, as indicated in Article 70(1), such benefits have the characteristics of both social security and social assistance.

9. Article 70(2) of the Regulation lists the substantive characteristics that a benefit must possess in order to be categorised as a special non-contributory cash benefit.[8] The effect at law is that, pursuant to Article 70(3), certain rules laid down in the Regulation – including the waiver of residence under Article 7 – do not apply to such benefits. Indeed, Article 70(4) specifies that they are to be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation and at the expense of the institution of the place of residence.

7 — Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 248, p. 43), Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35), and Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4).

8 — In short, such a benefit must be of a supportive nature in relation to one of the risks mentioned in Article 3(1). It must provide the recipient with basic income, the amount of which is set in the light of the economic and social situation in the Member State concerned. It must also be financed through general taxation rather than through contributions made by the recipient. Finally, it must be listed in Annex X to the Regulation, which is indeed the case with the compensatory supplement.

10. Article 90(1) of the Regulation repealed Regulation No 1408/71 with effect from the date of the Regulation's application (1 May 2010), subject to a number of saving provisions. As in the case of the Regulation, social assistance was excluded from the scope of Regulation No 1408/71, pursuant to Article 4(4). Furthermore, Articles 4(2a) and 10a of Regulation No 1408/71 contained, as did Annex IIa thereto, provisions akin to those mentioned above, which were inserted by Regulation (EEC) No 1247/92. [9]

B – *National legislation*

1. The Austrian Niederlassungs- und Aufenthaltsgesetz

11. Lawful entry into Austria is governed by the Niederlassungs- und Aufenthaltsgesetz (NAG) (Settlement and Residence Act). Paragraph 51(1)(2) of the NAG provides that, on the basis of the Directive, economically inactive citizens of the European Economic Area ('EEA') are entitled to reside for periods in excess of three months if, inter alia, they have sufficient resources to support themselves and the members of their families so as not to be forced to have recourse to social assistance benefits or the compensatory supplement during their period of residence.

12. Under Paragraph 53 of the NAG, where EEA citizens with a right of residence under EU law intend to reside in Austria for longer than three months, they must, within four months of entry, notify the relevant authority, which is to issue a registration certificate upon request if the relevant conditions are met. For economically inactive persons, evidence of sufficient resources must be produced.

13. The referring court and the Austrian Government explain that the current wording of Paragraph 51(1) of the NAG stems from an amendment to the NAG by the Budgetary Act 2011, which added a requirement of lawful residence with effect from 1 January 2011. [10] According to the referring court, the purpose of the amendment was to prevent a situation in which inactive Union citizens and members of their families can place an undue burden on the Austrian budget.

2. The Austrian Allgemeines Sozialversicherungsgesetz

14. Paragraph 292(1) of the Allgemeines Sozialversicherungsgesetz (ASVG) (Federal Act on General Social Insurance [11]) provides that pensioners are to be entitled to a compensatory supplement to the pension where the pension plus net revenue from other sources falls short of the applicable threshold for minimum subsistence. Ever since the adoption of the Budgetary Act mentioned in point 13 above, such entitlement is conditional upon habitual and lawful residence in Austria.

II – Facts, procedure and the question referred

15. Mr Brey is a German national. He and his wife, who is also of German nationality, moved to Austria in March 2011, wishing to settle there on a permanent basis.

16. In accordance with the NAG, the Bezirkhauptmannschaft Deutschlandsberg (first-level Deutschlandsberg administrative authority) issued Mr Brey and his wife with the registration certificate for EEA citizens on 22 March 2011.

9 — Council Regulation (EEC) No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1992 L 136, p. 1).

10 — BGBl. I No 111/2010.

11 — Act of 9 September 1955, BGBl. No 189/1955, as amended.

17. According to the order for reference, at the time of his entry into Austria, Mr Brey received two different types of income from German sources: an invalidity pension of EUR 864.74 per month before tax, and a care allowance of EUR 225 per month. He has no other income or assets. While the couple lived in Germany, his wife received a basic benefit, which ceased on 1 April 2011, however, owing to the couple's move to Austria. Mr Brey and his wife pay a monthly rent of EUR 532.29 for their apartment in Austria.

18. By decision of 2 March 2011, the Pensionsversicherungsanstalt refused Mr Brey's application for a compensatory supplement in the amount of EUR 326.82 per month, on the basis that he did not have sufficient resources and therefore could not be lawfully resident.

19. Mr Brey contested that decision before the Landesgericht für Zivilrechtssachen (Regional Court for civil law matters) (Graz), which ruled against the Pensionsversicherungsanstalt by judgment of 17 May 2011. An appeal followed before the Oberlandesgericht (Higher Regional Court) (Graz), which upheld, in substance, the judgment given at first instance. The Pensionsversicherungsanstalt lodged a further appeal on a point of law to the referring court, which decided to stay the proceedings and refer the following question to the Court:

'Is a compensatory supplement to be regarded as a "social assistance" benefit within the terms contemplated in Article 7(1)(b) of [the Directive]?'

20. Written observations have been lodged by Mr Brey, by the German, Greek, Irish, Netherlands, Austrian, Swedish and UK Governments, as well as by the Commission. At the hearing on 7 March 2013, oral argument was presented by the German, Irish, Netherlands, Austrian, Swedish and UK Governments, and by the Commission.

III – Observations of the referring court and the parties before the Court of Justice

21. The Oberster Gerichtshof submits two hypotheses for consideration by the Court. According to the first line of argument, the Directive and the Regulation are to be interpreted in a harmonious and uniform fashion. The notion of 'social assistance' as used in the Regulation would therefore be fully transferable to the Directive. In this respect, the Regulation excludes social assistance from its scope, yet it nevertheless regulates special non-contributory cash benefits by virtue of Article 3(3), regardless of the fact that such benefits are not exportable. As the compensatory supplement in *Skalka* was held to be a special non-contributory benefit, it would follow that such a supplement does not constitute social assistance under the Regulation and, in consequence, cannot constitute social assistance under the Directive either. This view is supported by Mr Brey and the Commission.

22. According to the other line of argument, the notion of 'social assistance' as used in the Directive is linked to the particular aim of that directive and must therefore be different from the notion of 'social assistance' as used in the Regulation. That approach, it is argued, would be more consistent with recital 13 in the preamble to Directive 2003/109/EC ('the Long-Term Residence Directive').[12] Accordingly, the notion of 'social assistance' as used in the Directive would encompass the provision of basic welfare by a Member State out of general tax revenue, irrespective of the existence of legal rights or particular risks. According to the Pensionsversicherungsanstalt, which adheres to this view, the compensatory supplement is granted on the basis of actual need and is not financed by contributions but by the public purse. It therefore falls within the scope of 'social assistance' as referred to in Article 7(1)(b) of the Directive. This is the approach adopted by the Austrian legislature.

12 — Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), as amended by Directive 2011/51/EU of the European Parliament and of the Council of 11 May 2011 (OJ 2011 L 132, p. 1).

23. All the governments which have lodged observations in the matter essentially rally behind that second line of argument.

IV – Analysis

A – *Scope of the question referred*

24. By its question, the referring court seeks guidance as to whether a special non-contributory cash benefit, such as the compensatory supplement, constitutes 'social assistance' for the purposes of the Directive. The referring court explains that the Court has already characterised the compensatory supplement as a special non-contributory benefit under Regulation No 1408/71. It therefore asks for further clarification regarding the notion of 'social assistance' as used in the Directive and its relationship with that notion as used in other legislation, primarily the Regulation.

25. Many of the parties before the Court do not confine their remarks to this issue alone. On the whole, their observations address two other issues: (i) whether a requirement of lawful residence as a precondition for entitlement to the compensatory supplement is compatible not only with the Regulation but also with the Directive, and (ii) whether a person in Mr Brey's situation fulfils the requirement of sufficient resources laid down in Article 7(1)(b) of the Directive.

26. In its written observations, the Commission argues that the Austrian legislation is not compatible with either the Directive or the Regulation. The Commission urges the Court to reformulate the question and to rule upon the issue whether EU law, and in particular the Directive, allows payment of the compensatory supplement to be refused to a person in Mr Brey's situation.

27. However, at this stage, given that the dispute relates to social law, the only matter on which the referring court is called upon to decide is whether the benefit should be paid out to Mr Brey. It is clear from the wording of the question that the referring court wishes to know only whether the compensatory supplement can be regarded as 'social assistance' within the terms of Article 7(1)(b) of the Directive. Since it has not referred any other questions to the Court – for instance, on the lawfulness of the residence requirement – there is no need to consider the arguments regarding other issues, which have been put forward by the Commission and the various Member States which have submitted observations. [13]

28. For the same reason, I would decline the proposal made by the Netherlands Government that the Court rule, additionally, on whether an economically inactive person who does not satisfy the requirements laid down in Article 7(1)(b) of the Directive may nevertheless be entitled to receive an allowance in the host Member State. Indeed, under Article 267 TFEU, it is solely for the national court before which the dispute has been brought, and which will have to assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions to be submitted to the Court. [14]

13 — See Case C-265/05 *Perez Naranjo* [2007] ECR I-347, paragraph 60.

14 — See, inter alia, Case C-221/07 *Zablocka-Weyhermüller* [2008] ECR I-9029, paragraph 20, and Case C-311/08 *SGI* [2010] ECR I-487, paragraph 22 and the case-law cited. I note that in Case C-158/07 *Förster* [2008] ECR I-8507, the Court – unlike Advocate General Mazák (see points 61 and 76 to 90 of his Opinion) – did not follow the Commission's suggestion that it should analyse the question whether Ms Förster had retained her status as a worker under a different legislative act. Instead, it confined its answer to the scope of the question referred.

29. In any event, the question whether a Union citizen in Mr Brey's situation fulfils the requirement of sufficient resources presupposes that the compensatory supplement falls to be treated as 'social assistance' in the context of the Directive. That assessment is severable from the question concerning the right of residence, which is not an issue in the main proceedings. Naturally, however, the referring court may refer another question on that point, under Article 267(3) TFEU.

30. Nevertheless, I am aware that the outcome of these proceedings may have an impact on Mr Brey's right to reside in Austria. Accordingly, in case the Court decides to address issues outside the terms of the question referred, I will include further observations on this point in the final part of this Opinion.

B – *The notion of 'social assistance' as used in Article 7(1)(b) of the Directive*

1. Preliminary observations

31. The Directive does not define the term 'social assistance'. Consequently, it falls upon the Court to interpret that notion.

32. The Commission and Mr Brey point not only to the Directive but also to the Regulation. According to them, none of the benefits which fall within the scope of the Regulation – regardless of the way, shape or form in which they are regulated – can constitute social assistance.

33. On the other hand, many of the governments which have submitted observations refer essentially to two other pieces of secondary legislation, namely, the Long-Term Residence Directive and the 'Family Reunification Directive',[15] claiming that the notion of 'social assistance' as used in those directives more closely resembles that notion as used in the Directive.

34. In general, it is desirable to interpret concepts of EU law uniformly, as this makes for greater legal certainty. However, uniform interpretation is not always possible in practice.[16] In the present case, the parties before the Court arrive at opposite conclusions regarding the notion of 'social assistance' as used in the Directive by interpreting it in the light of various other pieces of secondary legislation. Given the divergences between those measures, it is clear that the term 'social assistance' as used in all those different contexts cannot denote the same concept. Accordingly, a choice has to be made.

2. Analysis of the notion of 'social assistance' as used in the Directive

35. The Directive regulates the right of Union citizens and their family members to move and reside freely within the territory of the Member States. It is structured in such a way as to distinguish between residence for less than three months, residence for more than three months, and permanent residence, which is obtained after five consecutive years of residence.

36. Different conditions with respect to the right of residence follow from that structure. In particular, under Article 6 of the Directive, all Union citizens have the right to reside for less than three months in another Member State. For residence of more than three months, Article 7 bases the conditions for residence on whether or not the Union citizen is economically active. Persons who are not workers, self-employed persons or students must, inter alia, fulfil the requirement of sufficient resources mentioned in point 4 above. Under Article 16 of the Directive, after the right to permanent residence has been acquired, Article 7 no longer determines the right to reside.

15 — Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 12).

16 — See, to that effect, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 31; Case C-138/02 *Collins* [2004] ECR I-2703, paragraph 32; and Case C-345/09 *van Delft and Others* [2010] ECR I-9879, paragraph 88.

37. An analysis of the Directive reveals that one of its provisions – Article 8(4) – links the notion of 'social assistance' with that of 'social security'. Under that provision, the amount considered to constitute 'sufficient resources' for the purposes of Article 7(1)(b) may not be higher than the threshold set for nationals of the host Member State to become eligible for social assistance, or, where that criterion is not applicable, higher than the minimum social security pension paid by the host Member State. In that situation, the minimum social security pension is used instead of social assistance as a yardstick and, consequently, to determine whether the Union citizen has sufficient resources. Thus, for the purposes of establishing whether a particular Union citizen has a right to reside in another Member State, the concepts of 'social assistance' and 'social security' overlap to a certain degree.

38. While the overarching aim of the Directive is to simplify and strengthen the right of all Union citizens to freedom of movement and of residence,[17] the particular aim of Article 7(1)(b) is to ensure that persons exercising their right of residence do not become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence.[18] This indicates that that provision seeks to prevent economically inactive Union citizens from using the welfare system of the host Member State to finance their livelihood.

39. The concept of 'social assistance system of the Member State' has been held to have an autonomous meaning under EU law.[19] Admittedly, the Court came to this conclusion in respect of another directive, namely, the Family Reunification Directive. Nevertheless, the language employed by the Court does not indicate that its findings were limited to that directive. Furthermore, there is no reference to national law in Article 7(1)(b) of the Directive.

40. Even though it has an autonomous meaning under EU law, the term 'social assistance' as used in the Directive does not necessarily have to be construed in the same way as it does in the context of other EU legislation.

41. From a literal point of view, the term 'social assistance' has technical connotations and no apparent usual meaning. Furthermore, a comparison of the different official language versions reveals that the term does not appear to be used in a uniform way.[20] This indicates that the term 'social assistance' as used in the Directive was not intended to have a precise meaning. In the light of the aims and purposes of the Directive, it would seem, if anything, to focus on benefits that a Union citizen has not contributed towards and which are funded by the public purse.

17 — See recital 3 in the preamble to the Directive, as well as Case C-480/08 *Teixeira* [2010] ECR I-1107, paragraph 60, and Case C-310/08 *Ibrahim and Secretary of State for the Home Department* [2010] ECR I-1065, paragraph 49.

18 — See recital 10 in the preamble to the Directive.

19 — Case C-578/08 *Chakroun* [2010] ECR I-1839, paragraph 45, where the Court, in that particular instance, used the expression 'its own independent meaning in European Union law'.

20 — Some versions reflect the same understanding as the English version. In the French version, 'social assistance' is rendered as 'assistance sociale'; in the Italian version as 'assistenza sociale'; in the Spanish version as 'asistencia social'; and in the Romanian as 'asistență socială'. On the other hand, the Portuguese version of the Directive uses the term 'segurança social', in spite of the fact that the expression 'assistência social' is used in Article 8(4) of the same Directive. Likewise, the Finnish term used in Article 7(1)(b), 'sosiaalihuoltojärjestelmälle', does not correspond to that used in Article 8(4), 'sosiaaliavustusta', and the German version of Article 7(1)(b) of the Directive uses the term 'Sozialhilfeleistungen', but the word 'Sozialhilfe' in Article 8(4). However, the German version of Article 7(1)(b) differs from the other versions, as it requires Union citizens to have sufficient resources for themselves and their family 'so that they do not need to have recourse to social assistance services of the host Member State during their residence there'. I will address this issue in point 74 below.

42. The Commission argues that the meaning of 'social assistance' as used in the Directive must be assessed in the light of the legislative proposal leading to its adoption.[21] The Commission contends that, by referring to the principle of non-exportability of social assistance – a basic principle of the Regulation – the *travaux préparatoires* indicate that the interpretation of the Directive is to reflect the Regulation. However, notwithstanding the vagueness of the explanatory memorandum ('…*is not, as a rule*…'), the fact that the other institutions did not react upon this particular point during the law-making process does not, in itself, validate or invalidate the observations made in the Commission's own document. Furthermore, the link mentioned above between 'social assistance' and 'social security' in Article 8(4) of the Directive weakens this argument.

43. In any event, if non-exportability were the main criterion for the notion of 'social assistance' under Article 7(1)(b) of the Directive, which the *travaux préparatoires* seem to suggest, contrary to the view put forward by the Commission, the compensatory supplement would constitute social assistance. Indeed, special non-contributory cash benefits are non-exportable under Article 70(4) of the Regulation.

44. From the foregoing, I deduce that: (i) in accordance with the aim of the Directive, the notion of 'social assistance' as used in the Directive is designed to set a limit to the right of Union citizens to freedom of movement, by protecting a Member State's public financial resources (see point 38 above); (ii) the notion is not necessarily interrelated with other EU legislation (see points 39 and 40 above); and (iii) the notion is, it would seem, deliberately imprecise (see points 37 and 47 above). In the following points, I will assess whether that interpretation is confirmed or refuted by the other pieces of secondary legislation referred to by the referring court and the parties which have submitted observations.

3. Comparison with the notion of 'social assistance' as used in the Regulation

45. As mentioned above, the Commission and the referring court evoke the possibility of interpreting the Directive in line with the Regulation. It is claimed that this would lead to the compensatory supplement being excluded from the notion of 'social assistance', as it has been held to come within the scope of the Regulation.

46. The Regulation coordinates the social security systems in place in the Member States. Within the scope of this coordination, Title I sets out the generally applicable provisions, including a list in Article 3(1) of the branches of social security to which the Regulation applies. Title II then provides for rules to determine the applicable national legislation. The provisions of the Regulation therefore form a system of conflict rules.[22] Title III contains the lion's share of provisions, coordinating in further detail the different types of benefit to which the Regulation applies, and includes Chapter 9 on special non-contributory cash benefits. Titles IV, V and VI contain various other provisions (such as on cooperation between the competent authorities of Member States). A number of Annexes (I to XI) are appended to the Regulation, specifying, inter alia, the legislation applicable in each Member State on the types of benefit, listed by name, to which the Regulation applies.

47. Yet, in order to understand the structure and context of the Regulation, a further look must be taken at the distinctions drawn between social security, social assistance and special non-contributory benefits.

21 — Commission Proposal of 23 May 2001 for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, COM(2001) 257 final, pp. 10 and 11 (OJ 2001 C 270 E, p. 150). It states, in regard to Article 7(1)(b), that '[w]hile the exercise of [the right to residence] 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' (emphasis added).

22 — See in respect of Regulation No 1408/71, *van Delft and Others*, paragraph 51 and the case-law cited.

48. In Article 3(5)(a), the Regulation establishes a distinction between social assistance and social security. However, according to case-law, certain types of benefit may perform a dual function of both social assistance and social security ('hybrid' benefits). [23] Those types of benefit are now governed by Article 70 of the Regulation. Article 70(1) sets out their main characteristics.

49. It is settled law that, within the ambit of the Regulation, a benefit may be regarded as a *social security benefit* in so far as it is granted to recipients on the basis of a legally defined position, without any individual and discretionary assessment of personal needs, and relates to one of the insured risks expressly listed in Article 3(1). [24] *Special non-contributory benefits* are defined in terms of their purpose. They must replace or supplement a social security benefit, while being distinguishable from that benefit, and they must, by their nature, constitute social assistance justified on economic and social grounds, as fixed by objective legal criteria. [25] The concepts of 'social security benefit' and 'special non-contributory benefit' are thus mutually exclusive. [26]

50. *Social assistance*, however, is not defined by the Regulation. It therefore tends to be defined in negative terms, as comprising those benefits which do not fit the positive description of 'social security benefit' mentioned in point 49 above. [27] However, an important feature of 'social assistance' is need. The Court has held that to make the grant of a benefit conditional upon an individual assessment of a claimant's personal needs '*is a characteristic feature of social assistance*'. [28] It also follows that Article 3(5) of the Regulation, which excludes, inter alia, social assistance, must be interpreted narrowly. [29]

51. The general object and purpose of the Regulation is, consistently with Article 42 EC (now Article 48 TFEU), to secure freedom of movement for employed and self-employed migrant workers and their dependants by making appropriate provision in the field of social security. The Regulation is intended, inter alia, to ensure that contributions made towards the social security system in one Member State can be exported to another Member State, thus enhancing the right to freedom of movement and contributing towards improving the standard of living and conditions of employment. [30] This arrangement is more generally extended to non-workers by virtue of Article 308 EC (now Article 352 TFEU).

52. However, it follows from recital 4 that the aim of the Regulation is not to harmonise, but merely to coordinate, the social security schemes of the Member States. Indeed, the Court has held that social assistance and other similar benefits falling outside the scope of the Regulation remain within the competence of the Member States. [31]

23 — See, for example, Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 19.

24 — See, to that effect, Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, paragraph 63 and the case-law cited.

25 — See, to that effect, Case C-299/05 *Commission* v *Parliament and Council* [2007] ECR I-8695, paragraph 55 and the case-law cited.

26 — Case C-286/03 *Hosse* [2006] ECR I-1771, paragraph 36.

27 — See, to that effect, Case C-333/00 *Maaheimo* [2002] ECR I-10087, paragraphs 21 to 23.

28 — *Hughes*, paragraph 17 (emphasis added). See also, inter alia, Case 24/74 *Biason* [1974] ECR 999, paragraph 10.

29 — See, to that effect, *Habelt and Others*, paragraphs 65 and 108.

30 — See recital 1 in the preamble to the Regulation.

31 — See, to that effect, inter alia, Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 21; Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 23; and *Zablocka-Weyhermüller*, paragraph 27. Moreover, EU law does not detract from the powers of the Member States to organise their social security systems; see *van Delft and Others*, paragraph 84.

53. In this light, it appears that the specific purpose of Article 3(5)(a) of the Regulation is to ensure that social assistance as such remains uncoordinated and within the competence of the Member States. For the same reasons, the purpose of the provisions in the Regulation governing special non-contributory cash benefits is to ensure that such allowances – which are of a hybrid nature and which would otherwise be exportable – remain subject to a criterion of residence in the Member State charged with meeting their cost. [32]

54. At this point, it is appropriate to compare the Regulation's use of the notion of 'social assistance' with that of the Directive.

55. Apart from the fact that neither measure refers in any way to the other, the terminology employed in the various linguistic versions of the two measures is not uniform. In addition, the Directive creates, as mentioned above, a certain overlap between 'social assistance' and 'social security'. In contrast, the Regulation neatly separates these notions. Moreover, the restrictive interpretation of the notion of 'social assistance' as used in the Regulation (see point 50 above) cannot sensibly be employed for the purposes of the Directive, which does not operate under the same dichotomy.

56. Above all, the notion of 'social assistance' as used in the two legal instruments cannot be the same, as they have different objectives. [33] The aim of Articles 3(5)(a) and 70(4) of the Regulation is to prevent the export of the benefits which they govern. The aim of Article 7(1)(b) of the Directive, on the other hand, is to ensure that beneficiaries of a right of residence do not become an unreasonable burden on the social assistance system of the host Member State. This issue is harmonised by the Directive and therefore the Member States do not have competence to regulate the matter, unlike the content of the term 'social assistance' as used in the Regulation.

57. On that basis, I do not find that the content of the notion of 'social assistance' as used in the Regulation invalidates in any way the preliminary view stated in point 44 above, as the two notions do not relate to the same issues. This leaves me with the two remaining legal instruments which have been invoked in order to clarify the notion of 'social assistance'.

4. Comparison with the notion of 'social assistance' as used in the Family Reunification Directive and the Long-Term Residence Directive

58. The Netherlands, Austrian, Swedish and UK Governments refer to Article 7(1)(c) of the *Family Reunification Directive*, which they claim is similar to Article 7(1)(b) of the Directive and was interpreted by the Court in *Chakroun*.

59. The Family Reunification Directive governs the right of third-country nationals, on the basis of EU law, to family reunification. Its purpose is to determine the conditions for the exercise of the right to family reunification by third-country nationals residing lawfully in the territory of the Member States and it sets the requirements for exercise of that right. [34] In this respect, Article 7(1)(c) limits the right to third-country nationals who have stable and regular resources which are sufficient to maintain their households 'without recourse to the social assistance system of the Member State concerned'. Chapter VI regulates the entry and residence of family members.

32 — See recital 8 in the preamble to Regulation No 1247/1992.

33 — The two acts do not have the same legal basis. The Directive was adopted pursuant to Articles 12, 18, 40, 44 and 52 EC (now Articles 18, 21, 46, 50 and 59 TFEU) on, respectively, the fundamental principle of non-discrimination, citizenship of the Union, freedom of movement for workers, right of establishment, and free movement of services. The Regulation, on the other hand, was adopted in accordance with Articles 42 and 308 EC (now Articles 48 and 352 TFEU), which relate to social security in the context of free movement of workers, and rules supporting an EU policy for which there is no sufficient legal basis in the FEU Treaty.

34 — See Article 1 and Chapter IV of the Family Reunification Directive.

60. In *Chakroun*, the Court held that the concept of 'social assistance' as used in Article 7(1)(c) of the Family Reunification Directive must be interpreted as referring to assistance which compensates for a lack of stable, regular and sufficient resources, and not as referring to assistance which enables exceptional or unforeseen needs to be addressed. [35]

61. As for the *Long-Term Residence Directive*, to which the referring court and the Austrian Government refer, it regulates not only acquisition of long-term resident status in a Member State, but also residence in other Member States on the basis of that status and the economic requirements to be met in this connection. Article 11(4) of that directive provides that Member States may limit equal treatment in respect of social assistance and social protection to 'core benefits'. On this issue, the Austrian Government and the referring court point to recital 13 [36] and, as regards the former, to the judgment in *Kamberaj*. [37]

62. In *Kamberaj*, the Court held in paragraph 90 that the aim of the Long-Term Residence Directive is to promote the integration of third-country nationals who have resided legally and continuously in the Member States. It went on to state, in paragraph 92, that housing allowance constituted a core social assistance benefit within the meaning of Article 11(4) of that directive, provided that the aim of the benefit in question was to ensure a decent existence for those lacking sufficient resources, in accordance with Article 34 of the Charter of Fundamental Rights of the European Union. Furthermore, in paragraph 85 of *Kamberaj*, the Court held that the list of core benefits in recital 13 was not exhaustive.

63. The view stated in point 44 above on the concept of 'social assistance' as used in the Directive thus appears to be confirmed by the Family Reunification Directive and the Long-Term Residence Directive.

64. All three directives indicate an imprecise and broad concept of 'social assistance'. For instance, in order to establish whether a third-country national has stable and regular resources, so as to qualify for family reunification under Article 7(1)(c) of the Family Reunification Directive, Member States may 'take into account the level of minimum national wages and pensions'. This is equally the case for third-country nationals with long-term status wishing to reside in another Member State under Article 15(2)(a) of the Long-Term Residence Directive. Those provisions are comparable to Article 8(4) of the Directive. Moreover, Article 11(1)(d) of the Long-Term Residence Directive does not distinguish between social security, social assistance and social protection.

65. Although the Directive and the two other directives concern different categories of person and do not have a strictly identical purpose and scope, [38] they all share the common aim of regulating the right to reside. Moreover, the rules relating to social assistance in all three directives seem to be rooted in a common desire to protect the public purse. Accordingly, 'social assistance' can be understood as denoting the same concept in all three directives. This appears to correspond with the view of the Court, given the reference in *Chakroun*, regarding the concept of 'social assistance', to paragraph 29 of *Eind* [39] which concerned, inter alia, the interpretation of Directive 90/364/EEC. [40]

35 — Paragraph 49 of the judgment; see also Joined Cases C-356/11 and C-357/11 *O and S* [2012] ECR, paragraph 73.

36 — That recital states that '[w]ith regard to social assistance, the possibility of limiting the benefits for long-term residents to core benefits is to be understood in the sense that this notion covers at least minimum income support, assistance in case of illness, pregnancy, parental assistance and long-term care. The modalities for granting such benefits should be determined by national law.'

37 — Case C-571/10 *Kamberaj* [2012] ECR.

38 — The legal basis for the Family Reunification Directive is the special provision in the former Title IV of the EC Treaty, namely, Article 63(3)(a) EC (now replaced by Article 79 TFEU), under the heading 'Visas, asylum, immigration and other policies relating to free movement of persons' (now, after the entry into force of the Treaty of Lisbon, included in Chapter II of Title V of the FEU Treaty, renamed 'Policies on border checks, asylum and immigration'). The legal basis for the Long-Term Residence Directive is Article 63(3) and (4) EC.

39 — Case C-291/05 *Eind* [2007] ECR I-10719.

40 — Council Directive 90/364/EEC of 28 June 1990 on the right of residence (OJ 1990 L 180, p. 26).

66. The finding of the Court that the phrase 'social assistance system of the Member State concerned' as used in Article 7(1)(c) of the Family Reunification Directive covers social assistance granted by the public authorities, whether at national, regional or local level,[41] is also relevant in respect of the Directive. It is consistent with the idea that the benefit must form part of a social assistance system.

67. For those reasons, I find that the notion of 'social assistance' as used in the Directive is similar to that used in the other two directives. It should therefore be interpreted accordingly.

5. Interim conclusion

68. On the basis of the foregoing, it is my view that the definition of 'social assistance' in *Chakroun* is to be applied to Article 7(1)(b) of the Directive. It follows that, for the purposes of that provision, 'social assistance' refers to assistance granted by the public authorities – whether at national, regional or local level – which compensates for a lack of stable, regular and sufficient resources, and not assistance which enables exceptional or unforeseen needs to be addressed.

69. Although the issue as to whether a benefit is governed by the Regulation should not be decisive in relation to the notion of 'social assistance' as used in Article 7(1)(b) of the Directive, that does not mean that the Regulation has no relevance at all; nor does it render the findings of the Court in *Skalka* obsolete. In so far as a benefit constitutes social assistance under the Regulation – implying that entitlement is based on the recipient's needs and not on contributions – this will also be true under the Directive.

70. Moreover, in *Skalka*, the Court remarked that the compensatory supplement guaranteed a minimum means of subsistence to persons whose total income fell below a statutory threshold, and that it was closely linked to the socio-economic situation in Austria, account being taken of the standard of living there. The cost of financing that supplement was borne by the federal budget and not by the recipients through contributions. Such a benefit was therefore 'by nature social assistance in so far as it is intended to ensure a minimum means of subsistence for its recipient where the pension is insufficient'.[42]

71. Accordingly, as it serves to compensate for a lack of stable, regular and sufficient resources and not only to address exceptional or unforeseen needs, the complementary supplement must be held to be 'social assistance' under Article 7(1)(b) of the Directive.

C – *Observations on issues outside the terms of the question referred*

72. In the event that the Court decides to provide the referring court with further elements which may be of assistance in adjudicating on the case before it, it is settled law that, in the application of Article 267 TFEU, the Court may extract from the wording of the question referred and the facts described in the order for reference all those elements which concern the interpretation of EU law.[43] Moreover, although it is not the task of the Court under Article 267 TFEU to rule upon the compatibility of national law with rules of EU law, it may provide guidance on the interpretation of EU law in order to enable the national court to determine the issue of compatibility for the purposes of the case before it.[44]

41 — *Chakroun*, paragraph 45.

42 — In paragraphs 24, 26 and 29 of the judgment.

43 — Case C-251/06 *ING. AUER* [2007] ECR I-9689, paragraph 38; Case C-420/07 *Apostolides* [2009] ECR I-3571, paragraph 63; and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 24.

44 — Case C-118/08 *Transportes Urbanos y Servicios Generales* [2010] ECR I-635, paragraph 23 and the case-law cited.

73. Accordingly, two issues appear to merit further reflection: (i) whether national rules such as those applicable in the main proceedings are compatible with the Directive, and (ii) whether payment of the compensatory supplement amounts to an unreasonable burden on the Austrian social assistance system.

1. Compatibility with the Directive of national legislation under which lawful residence is a precondition for entitlement to social assistance

74. At the outset, I would note that the German version of Article 7(1)(b) of the Directive uses the expression 'so dass sie … keine Sozialhilfeleistungen des Aufnahmemitgliedstaats in Anspruch nehmen müssen'. This could be translated as 'so that they do not need to have recourse to social assistance benefits of the host Member State ', and, accordingly, that provision appears to be framed in stricter terms in German than in several other language versions. It would seem to imply that no recourse at all may be had to the social assistance system of the host Member State.

75. Such a reading would be at odds with other provisions of the Directive. Indeed, Article 8(4) of the Directive requires an individual assessment of the personal situation of the Union citizen. Article 14(2) prescribes that only where there is reasonable doubt as to whether the Union citizen no longer satisfies the requirement of sufficient resources, as set out in Article 7, may the host Member State verify, on a non-systematic basis, if the conditions for residence are met. Likewise, Article 14(3) explicitly proscribes expulsion measures as a consequence of mere recourse to the social assistance system of the host Member State. In *Commission* v *Belgium*,[45] which concerned, inter alia, Directive 90/364, the Court expressed disapproval of a practice involving automatic expulsions where Union citizens were unable to provide evidence of sufficient resources by a given deadline.

76. Nor can such a reading be reconciled with the preamble to the Directive. Indeed, recital 10 does not refer simply to a burden, but to a *disproportionate* burden. In other words, not just any burden can justify the loss of a right of residence, but only those which sufficiently hamper the proper functioning of the social assistance system of the host Member State. Member States must indeed tolerate a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States.[46] Recital 16 provides the relevant criteria for determining whether a Union citizen is an unreasonable burden on the social assistance system of the Member State. The criteria include: whether the difficulties are temporary; the duration of residence; personal circumstances; and the amount of aid granted.

77. The German version of Article 7(1)(b) of the Directive appears surprising in the light of those remarks. To make the right of residence in a Member State conditional upon the person having had no recourse to social assistance would wholly deprive the aforementioned provisions of the Directive of their purpose. Thus, in order to establish the meaning of that provision, the German version must be interpreted in light of the purpose and general scheme of the Directive. The wording of the provision by itself cannot serve as the sole basis for its interpretation or override other language versions.[47]

78. Here, it is important to note that Paragraph 51(1) of the NAG mirrors the German version of Article 7(1)(b) of the Directive. It would therefore seem that the right of Union citizens to reside in Austria is conditional upon not being in receipt of a compensatory supplement. Moreover, pursuant to Paragraph 292(1) of the ASVG, the compensatory supplement is limited to persons having their lawful

45 — Case C-408/03 *Commission* v *Belgium* [2006] ECR I-2647.

46 — Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraph 44, and Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 56.

47 — See, to that effect, Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16 and the case-law cited.

residence in Austria. Thus, it appears that the effect of these provisions is to exclude Union citizens who wish to reside in Austria for more than three months (and, presumably, until they obtain permanent residence under Article 16 of the Directive) from recourse to the social assistance system of that Member State as well as from an allowance such as the compensatory supplement.

79. If that interpretation of national law were to be correct – which is a matter for the Oberster Gerichtshof to decide [48] – I would have to concur with the Commission that this places Union citizens at a disadvantage as compared with Austrian nationals, who, as the Austrian Government recognises, have an inherent right to reside in Austria [49] and therefore fulfil the condition more easily. Although the rules in question do not discriminate directly on the basis of nationality, they would nevertheless appear to me to amount to indirect discrimination. [50]

80. That said, the Court has held in various circumstances that Member States may require lawful residence before granting social assistance benefits, provided that such a requirement complies with EU law. [51] It is indeed legitimate for the national legislature to wish to ensure a genuine link between a claimant and a benefit, and the competent Member State. [52] Moreover, Article 70(4) of the Regulation clearly states that special non-contributory cash benefits are provided in accordance with the legislation of the host Member State.

81. Under the Directive, it would seem justified for a Member State to protect its social assistance system in respect of inactive Union citizens who have not yet obtained permanent residence. However, contrary to the German Government's view, it follows from points 75 and 76 above that rules which make the right to reside conditional upon not having recourse to the social assistance system of the host Member State and which do not provide for an individual assessment of a Union citizen's economic capability are incompatible with Articles 8(4) and 14(3) of the Directive. A mere request for social assistance cannot amount *in itself* to a disproportionate burden on the social assistance system of a Member State and cause the loss of the right to reside – as the Austrian Government seems to recognise. Indeed, in *Chakroun*, the Court excluded aid to address exceptional or unforeseen needs from the notion of 'social assistance'. Accordingly, a Union citizen cannot be penalised for requesting such aid. In the end, however, it is for the referring court to verify whether the national law can be interpreted in such a way as to be in conformity with EU law. [53]

2. Whether payment of the compensatory supplement amounts to an unreasonable burden on the Austrian social assistance system

82. Assuming that the Court accepts my interpretation of the notion of 'social assistance' as used in Article 7(1)(b) of the Directive, and that Austrian law can be interpreted in a manner consistent with EU law, the question remains whether accepting Mr Brey's entitlement to the compensatory supplement would be an unreasonable burden on the Austrian social assistance system. Given the content of recital 16 of the Directive, this would appear to be the case.

48 — I note, in this respect, that the referring court confirms that receipt of the compensatory supplement is intended to impact adversely on the right of residence.

49 — See, to that effect, Article 3(2) of the Fourth Protocol to the European Convention on Human Rights.

50 — See, to that effect, *Collins*, paragraph 65; *Bidar*, paragraph 53; Case C-258/04 *Ioannidis* [2005] ECR I-8275, paragraph 28; and Case C-103/08 *Gottwald* [2009] ECR I-9117, paragraph 28.

51 — See *Martínez Sala*, paragraph 63; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraph 43; *Bidar*, paragraph 37; and *Förster*, paragraph 39.

52 — Case C-503/09 *Stewart* [2011] ECR I-6497, paragraph 89.

53 — Case 14/83 *von Colson and Kamann* [1984] ECR 1891, paragraph 26.

83. According to the facts, Mr Brey does not have any income except for two pensions amounting to EUR 1 089.74 per month (one of which is before tax). With this, he must support himself and his wife – who no longer has an income – and pay a monthly rent of EUR 532.29, which leaves them with at most EUR 557.45 per month for food, utilities and other basic living requirements. This is below the threshold of the minimum subsistence level defined in Austrian legislation, a situation which the compensatory supplement is intended to remedy, and the reason why Mr Brey requested a monthly payment in the amount of EUR 326.82.

84. As Mr Brey is a pensioner, it is not apparent that his situation of financial hardship will change over time, or that the benefit is requested in order to surmount an exceptional, unforeseen hardship. [54]

85. The amount requested does not appear obviously disproportionate. However the total amount of aid may swell to a considerable amount, pending the decision by the Austrian authorities to revoke Mr Brey's residence permit.

86. It does not appear that Mr Brey, a German citizen of Russian origin, has any personal ties to Austria. Indeed, according to the referring court, he moved there because he was the victim, so he claims, of discrimination in Germany on account of his origin.

87. Lastly, the original administrative decision rejecting Mr Brey's application was issued on 2 March 2011, prior to his receipt of a residence permit on 22 March 2011. Indeed, the referring court states that the couple settled in Austria in the course of March 2011. He had therefore not accumulated any significant periods of residence in Austria before he made his application. In those circumstances, it would indeed appear that Mr Brey no longer meets the requirements for lawful residence under Article 7(1)(b) of the Directive.

88. Expanding on the aforementioned considerations, it seems difficult, at first glance, to grasp how a single individual can become an unreasonable burden on the finances of a Member State. Nevertheless, the rules in the Directive would be meaningless if this were not conceivable. Then again, had the case instead concerned a one-off payment of EUR 326.82, one could not sensibly speak of an 'unreasonable burden'. The unreasonableness lies in the fact that payment of the compensatory supplement is an indefinitely recurring event, yet Mr Brey is unable to demonstrate any prior links to Austrian society that would justify those payments. Were he to have forged a link to Austrian society, for instance, by having worked, resided and paid taxes there on a previous occasion, the situation would be different.

89. My position on this point thus leaves Mr Brey without the compensatory supplement. Because of the move to Austria, his household has also forfeited the pension which his wife received, as well as other residence-based benefits to which Mr Brey might have been entitled in Germany. However, that unfortunate consequence must be attributed to the lack of harmonisation of the Member States' rules on social assistance.

90. In any event, I do not find that the issue of Mr Brey's lawful residence can be dealt with completely in the course of the proceedings before this Court. On the one hand, this would amount to an application of the law to the facts. On the other hand, to do so would, for the following reasons, be in disregard of the procedure for revoking the right of residence.

91. The Austrian Government submits that its social authorities decide on the lawfulness of a Union citizen's right of residence as a separate matter, independently of the fact that Mr Brey has already received a residence permit from the immigration authorities. As lawful residence is a condition for payment of the compensatory supplement, that government contends that the social authorities must be able to assess whether the applicant is lawfully resident in Austria.

54 — *Grzelczyk*, paragraph 45, and *Chakroun*, paragraph 52.

92. In my view, that argument has no bearing on this issue.

93. Admittedly, a Union citizen's residence permit is merely declarative.[55] This means that the right of residence can be lost or gained depending on whether the conditions laid down in Article 7 of the Directive are fulfilled at a given time, and not on whether the Union citizen is in possession of a valid residence permit. Pursuant to Paragraph 53 of the NAG, Austria has seized the opportunity under the second indent of Article 8(3) of the Directive to require Union citizens applying for a residence permit to demonstrate that they meet the requirement of sufficient resources. Thus, the fact that the Austrian authorities issued a residence permit shows that they were of the view that Mr Brey was lawfully resident at that time. This was *after* the initial decision rejecting his application for a compensatory supplement. Furthermore, Union citizens undoubtedly enjoy the procedural guarantees referred to in Article 15 of the Directive, which cannot be circumvented through proceedings which deal not only with that person's entitlement to a benefit, but also with his right of residence altogether.

94. A Member State may take the view that a Union citizen who has recourse to social assistance no longer fulfils the conditions of his right of residence and may take measures, within the limits imposed by EU law, to withdraw the person's residence permit. Indeed, the loss of sufficient resources is always an underlying risk. Thus, Article 14 of the Directive enables the host Member State to monitor whether Union citizens still meet the conditions laid down in Article 7.[56] However, in such cases, the approach adopted by the Court has been that, so long as Union citizens reside lawfully under EU law in another Member State, they may rely on EU law, including the principle of equal treatment, in order to receive social benefits, notwithstanding that this may subsequently compromise their right of residence.[57]

95. In this context, it is to be noted that the principle of equal treatment in Article 24(1) of the Directive is not unconditional. Under Article 24(2), a host Member State may restrict entitlement to a social assistance benefit during the first three months of residence, unless that benefit is intended to facilitate access to the labour market of the host Member State.[58] A benefit which is intended to supplement a recipient's pension does not appear to facilitate such access. Nevertheless, as far as I can see, the principle of equal treatment does not seem directly relevant to the issue of entitlement to the compensatory supplement under Paragraph 292(1) of the ASVG. That provision only appears to make entitlement conditional upon habitual and lawful residence, which, as was mentioned in point 93 above, the Austrian authorities have acknowledged Mr Brey as having.

96. To resume, until the host Member State has put an end to the lawful residence of a Union citizen by a decision that complies with the procedural guarantees enshrined, notably, in Articles 15, 30 and 31 of the Directive – which is not the position in the present case – a citizen such as Mr Brey may invoke EU law for the duration of his lawful stay. Such a decision must be taken independently of the question whether the Union citizen fulfils the requirement of sufficient resources, that is to say, the question at issue in the social law dispute before the referring court.

55 — See, inter alia, Case C-325/09 *Dias* [2011] ECR I-6387, paragraphs 48 to 49 and the case-law cited.

56 — See, to that effect, *Grzelczyk*, paragraph 42, and *Commission* v *Belgium*, paragraphs 47 and 50.

57 — See, to that effect, *Grzelczyk*, paragraph 36; *Trojani*, paragraph 40; *Bidar*, paragraph 46; and *Förster*, paragraph 43.

58 — Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paragraph 45.

V – Conclusion

97. In light of the above, I propose that the Court answer the question referred by the Oberster Gerichtshof as follows:

Article 7(1)(b) 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, as amended, is to be interpreted as meaning that an allowance such as the compensatory supplement as defined in Paragraph 292(1) of the Allgemeines Sozialversicherungsgesetz constitutes 'social assistance' for the purposes of that provision of the directive.