Reports of Cases

OPINION OF ADVOCATE GENERAL
WATHELET
delivered on 26 March 2015 [1]

Case C-67/14

Jobcenter Berlin Neukölln
v
Nazifa Alimanovic,
Sonita Alimanovic,
Valentina Alimanovic,
Valentino Alimanovic

(Request for a preliminary ruling from the Bundessozialgericht (Germany))

(Regulation (EC) No 883/2004 — Directive 2004/38/EC — Citizenship of the Union — Equal treatment — Union citizens who are resident in the territory of another Member State and no longer have the status of workers — Legislation of a Member State providing for the exclusion of such persons from special non-contributory cash benefits)

I – Introduction

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

2. The problem is sensitive in human and legal terms. It will necessarily lead to the Court ruling both on the protection offered by EU law to its citizens, as regards their financial situation and their dignity too, and on the current scope of the fundamental right to free movement, a founding principle on which the European Union is built.

3. To that end, the Court must once again turn its attention to the relationship between Regulation No 883/2004 and Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC. [4]

1 — Original language: French.
2 — OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1.
3 — OJ 2010 L 338, p. 35.
4 — OJ 2004 L 158, p. 77, and corrigenda in OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34.

4. The Court has just given the first part of the answer to those questions in *Dano*.[5] The unusual stir that that Court judgment has caused in the European media and all the political interpretations that have accompanied it confirm the importance and sensitivity of the subject.

5. Following that judgment, it is established that the Member States may — but are not obliged to — refuse to grant social assistance to Union citizens who enter their territory without intending to find a job and without being able to support themselves by their own means.

6. However, although the principle is clear, the question of its application may arise in very varied factual situations and the present request for a preliminary ruling gives the Court the opportunity of providing clarification in one of them.

7. This case is concerned with the situation in which, after working for less than a year in the territory of a Member State of which he is not a national, a Union citizen applies for subsistence benefits in the host State.

II – Legal framework

A – *EU law*

1. The Treaty on the Functioning of the European Union

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

9. Article 20 TFEU provides that citizenship of the Union is established and that every person holding the nationality of a Member State is to enjoy Union citizenship. In accordance with Article 20(2) TFEU, citizens of the Union are to have, inter alia, 'the right to move and reside freely within the territory of the Member States'. In accordance with the second subparagraph of Article 20(2) TFEU, that right is to be exercised 'in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder'.

10. Article 45 TFEU assures more specifically freedom of movement for workers within the European Union. According to Article 45(2) TFEU, such freedom of moment 'shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment'.

2. Regulation No 883/2004

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

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

…

(h) unemployment benefits;

…

5 — C-333/13, EU:C:2014:2358.

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

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

…

5. This Regulation shall not apply to:

(a) social and medical assistance or

…'

12. Under Article 4 of that regulation, entitled 'Equality of treatment':

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

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

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

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

(a) are intended to provide either:

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

or

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

and

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

and

(c) are listed in Annex X.

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

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

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

'…

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

3. Directive 2004/38

15. Recitals 10, 16 and 21 to Directive 2004/38 state as follows:

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

…

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

…

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

16. Article 6 of Directive 2004/38, entitled 'Right of residence for up to three months', provides in paragraph 1 as follows:

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

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

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

(a) are workers or self-employed persons in the host Member State; or

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

…

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

…

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

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

…’

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

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

…

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

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

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

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

19. Finally, Article 24 of that directive, entitled 'Equal treatment', states:

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

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

B – *German law*

1. The Social Code

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

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

1. benefits for integration into the labour market,

2. benefits to cover subsistence costs.

…'

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

'(1) Basic provision [('Grundsicherung')] for jobseekers is intended to enable its beneficiaries to lead a life in keeping with human dignity.

…

(3) Basic provision for jobseekers encompasses benefits:

1. intended to bring to an end or reduce need, in particular by integration into the labour market, and

2. intended to cover subsistence costs.'

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

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

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

2. who are fit for work,

3. who are in need of assistance, and

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

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

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

…

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

…'

23. Paragraph 8 of SGB II, devoted to the concept of 'fitness for work', provides:

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

…'

24. Paragraph 9 of SGB II provides:

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

…'

25. Paragraphs 14 to 18e of SGB II, forming the first section of Chapter 3, set out benefits concerning integration into the labour market.

26. Additional provisions are set out in Paragraph 20 of SGB II on basic subsistence needs, in Paragraph 21 of SGB II on additional needs and in Paragraph 22 of SGB II on accommodation and heating needs. Finally, Paragraphs 28 to 30 of SBG II deal with education and participation benefits.

27. In Book XII of the Social Code (Sozialgesetzbuch Zwölftes Buch, 'SGB XII'), Paragraph 1, which relates to social assistance, provides:

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

28. Paragraph 21 of SGB XII provides:

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

2. The FreizügG/EU

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

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

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

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

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

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

…

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

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

…

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

…

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

…

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

…’

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

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

3. The European Convention on Social and Medical Assistance

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

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

III – The facts of the case in the main proceedings

34. Ms Alimanovic and her three children, Sonita, Valentina and Valentino, are all Swedish nationals. All three children were born in Germany, in 1994, 1998 and 1999 respectively.

35. It is clear from the request for a preliminary ruling that the applicants in the main proceedings left Germany between 1999 and 2010. Without stating the departure point or the reason for that absence, the referring court states that the applicants in the main proceedings 're-entered' Germany in June 2010.

36. Following that return to Germany, the applicants in the main proceedings were issued, on 1 July 2010, with a certificate in accordance with Paragraph 5 of the FreizügG/EU. Ms Alimanovic and her eldest daughter, Sonita, who were fit for work within the meaning of the German legislation, worked between June 2010 and May 2011, that is to say, for less than a year, in short-term jobs or under employment-promotion measures.

37. The referring court, the Bundessozialgericht (Federal Social Court, Germany), states that all the applicants in the main proceedings received, in addition, benefits to cover subsistence costs under SGB II, which were last provided for the period from 1 December 2011 to 31 May 2012. Ms Alimanovic and her daughter Sonita received subsistence allowances for beneficiaries fit for work ('Arbeitslosengeld II'), whereas Ms Alimanovic's two other children, Valentina and Valentino, received social allowances for beneficiaries unfit for work.

38. When granting the benefits, the competent authority, the Jobcenter Berlin Neukölln ('the Jobcenter'), started from the assumption that the rule excluding Union citizens seeking employment provided for in point 2 of the second sentence of Paragraph 7(1) of SGB II was precluded by the principle of non-discrimination provided for in Article 1 of the Assistance Convention. However, relying on the reservation, the Jobcenter suspended in full the grant of benefits in May 2012.

39. On the basis of an application made by the applicants in the main proceedings, the Sozialgericht Berlin annulled that decision. According to that court, although, after ceasing employment in 2011, Ms Alimanovic and her daughter Sonita could rely only on a right of residence to seek employment, the exclusion from entitlement to benefits under point 2 of the second sentence of Paragraph 7(1) of SGB II was, however, not applicable, inasmuch as Article 4 of Regulation No 883/2004 prohibits any discrimination against Union citizens in relation to the nationals of the Member State concerned with regard to the special non-contributory cash benefits at issue. According to the Sozialgericht Berlin, there was no contradiction between that and the possibility of limiting the receipt of 'social assistance' under, inter alia, Article 24(2) of Directive 2004/38. That court took the view, in addition, that the special principle of non-discrimination recognised by Article 1 of the Assistance Convention continued to require the exclusion rule not to be applied, for, in its view, the reservation had not been converted into, or validated in, national law.

40. Taking the view that the exclusion from entitlement to benefits was not contrary to EU law, the Jobcenter brought an action against that decision before the referring court. According to the Jobcenter, the benefits to cover subsistence costs under SGB II constitute 'social assistance' within the meaning of Article 24(2) of Directive 2004/38 and, therefore, jobseekers may be refused the grant of such benefits. According to the Jobcenter, the purpose of those benefits is not to facilitate access to the labour market, Paragraph 16 et seq. of SGB II providing for other benefits specifically paid in order to integrate jobseekers into the labour market. Moreover, according to the Jobcenter, point 2 of the second sentence of Paragraph 7(1) of SGB II does not infringe Regulation No 883/2004 and the exclusion from entitlement to benefits is not contrary to the Assistance Convention either, given that the reservation is valid and complies with the German Constitution.

41. The referring court states also that, according to the findings of the Sozialgericht Berlin, by which it is bound, Ms Alimanovic and her daughter Sonita could no longer rely on a right of residence as workers under Paragraph 2 of the FreizügG/EU. Since June 2010, they had worked only in short-term jobs or under employment-promotion measures for less than a year and, since May 2011, they had been neither workers nor self-employed. The Bundessozialgericht therefore assumes that, upon expiry of a period of six months after the end of their employment, that is to say, in December 2011, those applicants in the main proceedings lost their status of workers in accordance with the second sentence of Paragraph 2(3) of the FreizügG/EU in conjunction with Article 7(3)(c) of Directive 2004/38.

42. Consequently, the national court considers that Ms Alimanovic and her daughter Sonita ought to be regarded as jobseekers in accordance with Paragraph 2(2)(1) of the FreizügG/EU, inasmuch as they have worked only in short-term jobs or under employment-promotion measures for less than a year. Accordingly, in accordance with SGB II and, more specifically, with point 2 of the second sentence of Paragraph 7(1) thereof, their entitlement to subsistence allowances and, thereby, the secondary entitlement of Valentina and Valentino to social assistance to cover subsistence costs under that provision, are precluded.[6]

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

43. It is in that context that the referring court raises the question whether the exclusion rule in point 2 of the second sentence of Paragraph 7(1) of SGB II is compatible with various rules of EU law.

6 — Although that entitlement was retained for the period from 1 December 2011 to May 2012, that is because the exclusion provided for in Paragraph 7 of SGB II was precluded by Article 1 of the Assistance Convention. The effects of that article lapsed, none the less, on 19 December 2011, on account of the reservation made by the Federal Republic of Germany.

44. By decision of 12 December 2013, received at the Court on 10 February 2014, the Bundessozialgericht accordingly decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling under Article 267 TFEU:

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

(2) If the first question is answered in the affirmative: may the principle of equal treatment laid down in Article 4 of Regulation [No 883/2004] be limited by provisions of national legislation implementing Article 24(2) of Directive 2004/38 that do not in any circumstances allow access to those benefits in the case in which the right of residence of the citizen of the Union in another Member State arises solely out of the search for employment and, if so, to what extent may that principle be so limited?

(3) Does Article 45(2) TFEU, [read] in conjunction with Article 18 TFEU, preclude a provision of national law that does not in any circumstances allow the grant of a social benefit, intended to ensure subsistence and to facilitate access to the labour market, to citizens of the Union who, as job-seekers, may invoke the exercise of their right of free movement when they enjoy a right of residence arising solely out of the search for employment, irrespective of a link to the host Member State?’

45. Written observations were submitted by the German Government, Ireland, the Italian, Swedish and United Kingdom Governments and the European Commission.

46. They all also presented oral argument at the hearing on 3 February 2015 (with the exception of the Italian Government). The representatives of Ms Alimanovic and of the Danish and French Governments, who had not submitted written observations, were also able to put forward their arguments at that hearing.

V – Analysis

A – *The first question*

47. By its first question, the referring court asked whether Article 4 of Regulation No 883/2004 was applicable to special non-contributory cash benefits within the meaning of Article 70 of that regulation. By order of 11 February 2015, however, it decided to withdraw that first question.

48. The question was in fact asked in the same terms in the case giving rise to the judgment in *Dano* (C-333/13, EU:C:2014:2358) and, in that case, the Court answered in the affirmative, holding that ‘Regulation No 883/2004 [had to] be interpreted as meaning that “special non-contributory cash benefits” as referred to in Articles 3(3) and 70 of the regulation fall within the scope of Article 4 of the regulation’.[7]

7 — Paragraph 55 and point 1 of the operative part.

B – *The second and third questions*

49. By its second and third questions, the referring court asks the Court, in essence, whether the legislation of a Member State, in accordance with which nationals of other Member States who have made use of their right of freedom of movement with the aim of seeking employment are excluded from entitlement to certain special non-contributory cash benefits within the meaning of Regulation No 883/2004, although those benefits are granted to nationals of the Member State concerned who are in the same situation, is compatible with Article 24(2) of Directive 2004/83, on the one hand, and with Articles 18 TFEU and 45(2) TFEU, on the other. [8]

50. The Court has previously held that a special non-contributory cash benefit within the meaning of Regulation No 883/2004 could also be covered by the concept of 'social assistance system', as used in Article 7(1)(b) of Directive 2004/38. [9] However, if such financial benefits are intended to facilitate access to the labour market, they cannot then be regarded as constituting 'social assistance', within the meaning of Article 24(2) of Directive 2004/38. [10]

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

1. The nature of 'basic provision' benefits ('Grundsicherung') [11] in the light of Regulation No 883/2004 and Directive 2004/38

52. Classification of the measure at issue in the case in the main proceedings is essential, for it determines the provision in the light of which the compatibility of a scheme such as that at issue in the case in the main proceedings must be evaluated: Article 24(2) of Directive 2004/38, if it is social assistance, or Article 45(2) TFEU, in the case of a measure intended to facilitate access to the labour market.

53. In this regard, inasmuch as the legislation at issue in the present case is identical to that at issue in the judgment in *Dano* (C-333/13, EU:C:2014:2358), I shall, first of all, refer to the Court's analysis. For the sake of completeness, I shall then address the jurisdiction of the referring court and the effect of the possibly mixed nature of the benefit on the classification of the measure (that is to say, the case in which the benefit in question possesses both features relating to social assistance and features relating to integration into the labour market).

a) The analysis of 'basic provision' benefits ('Grundsicherung') in the judgment in *Dano*

54. It is true that the Court examined the compatibility of a rule such as that provided for by the legislation at issue in the main proceedings with Article 24(1) of Directive 2004/38, and not with Article 24(2). It none the less classified the contested measure as 'social assistance' within the meaning of that directive.

55. After noting that the concept of 'social assistance' within the meaning of Article 24(2) of Directive 2004/38 referred to 'all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who by reason of that fact

8 — In the following analysis I shall be prompted to draw a distinction between the nationals of one Member State who have just arrived in the territory of another Member State, on the one hand, and those who have already worked in that State before becoming economically inactive again, on the other.

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

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

11 — As it is known in SGB II.

may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State',[12] the Court took the view that it had to 'be established whether Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 preclude refusal to grant social benefits in a situation such as that at issue in the main proceedings'.[13]

56. By so doing, in my view, the Court has in fact analysed the benefit at issue in the main proceedings as being social assistance within the meaning of Directive 2004/38. That inference is confirmed by the statement in paragraph 69 of that judgment that, 'so far as concerns access to social benefits, *such as those at issue in the main proceedings*, a Union citizen can claim equal treatment with nationals of the host Member State only if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38'.[14]

57. Moreover, I note that the description of the benefits at issue given by the Federal Republic of Germany in its written observations reflects the definition of 'social assistance' within the meaning of Directive 2004/38 as recalled in point 55 of this Opinion. According to that Member State, '[t]he benefits to cover subsistence costs provided for in SGB II are financed by the Federal Government and local authorities and paid by the Jobcenters, which are the public authorities in that sense. In essence, those benefits serve to cover subsistence costs in so far as subsistence cannot be ensured by the person's own means and must therefore compensate for the inadequacy of the person's own income. Like the benefits under SGB XII, benefits to cover subsistence costs are paid in cases of need and, in principle, are of the same amount and calculated in the same way. Their amount is essentially limited to the funds necessary to guarantee a minimum, decent level of subsistence and they are based on household consumption expenditure for lower income brackets, as indicated by the statistics [see Paragraph 4 of the Gesetz zur Ermittlung der Regelbedarfe (Law on the Calculation of Standard Needs)]. The purpose of the benefits is, in essence, to cover subsistence'.[15]

58. The national court itself states, in its request for a preliminary ruling, that it is in a specific chapter that the SGB II sets out the measures for integration into the labour market that include benefits provided specifically for persons who are fit for work within the meaning of SGB II.[16]

59. In consequence, if the principle of the judgment in *Vatsouras and Koupatantze*[17] that financial benefits intended to facilitate access to the labour market cannot be regarded as constituting social assistance within the meaning of Article 24(2) of Directive 2004/38[18] is not to be reversed, I must therefore focus my analysis on Article 24(2) of Directive 2004/38 and not on Article 45(2) TFEU.

12 — Judgment in *Dano* (C-333/13, EU:C:2014:2358, paragraph 63), the Court citing the definition given in paragraph 61 of the judgment in *Brey* (C-140/12, EU:C:2013:565).

13 — Judgment in *Dano* (C-333/13, EU:C:2014:2358, paragraph 67). It appears that the [French] expressions 'prestations d'assistance sociale' and 'prestations sociales' (both translated in the English version of the judgment as 'social assistance') are both used without distinction by the Court. I therefore consider them to be synonymous (see also, in that regard, paragraphs 69, 70, 74 and 77 of that judgment).

14 — Ibid. (paragraph 69). Emphasis added.

15 — Paragraph 74 of the written observations of the Federal Republic of Germany. See also, in that regard, points 65 to 72 of my Opinion in *Dano* (C-333/13, EU:C:2014:341).

16 — Paragraph 47 of the request for a preliminary ruling. That is to say Chapter 3, which comprises Paragraphs 14 to 18e. The referring court continues by citing various examples such as entry allowance (Paragraph 16b of SGB II), employment promotion measures (Paragraph 16d of SGB II) or even promoting working relationships by wage subsidies paid to employers (Paragraph 16e of SGB II).

17 — C-22/08 and C-23/08, EU:C:2009:344.

18 — Ibid. (paragraph 45).

60. That article would have been relevant only if the purpose of the measure at issue in the main proceedings had been to facilitate access to the labour market, which would automatically preclude its classification as social assistance within the meaning of Directive 2004/38, the Court having consistently held that it is 'no longer possible to exclude from the scope of Article [45(2) TFEU], which expresses the fundamental principle of equal treatment, guaranteed by Article [18 TFEU], a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State'. [19]

b) The jurisdiction of the referring court and the effect of the possibly mixed nature of 'basic provision' benefits ('Grundsicherung')

61. The inferences I draw from the judgment in *Dano* (C-333/13, EU:C:2014:2358) regarding the classification of the basic provision benefits at issue in the main proceedings could prove bold, inasmuch as it is, according to settled case-law, for the national court to define the legal and factual context and to apply the rules of EU law to the case in the main proceedings. [20] Moreover, in its judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344), the Court held, with regard to a benefit under SGB II, that, 'it [wa]s for the competent national authorities and, where appropriate, the national courts … to assess the constituent elements of that benefit, in particular its purposes and the conditions subject to which it is granted'. [21]

62. The Swedish and United Kingdom Governments and the Commission support this idea in their written observations. However, the Federal Republic of Germany asks the Court to clarify the benefits at issue in the light of the diverging case-law of the German courts.

63. To that end, without going so far as to classify itself the national measure, the Court may, at the very least, 'provide a national court with all the elements relating to the interpretation of Community law which may be useful to it in assessing the effects of the provisions of that law'. [22]

64. In his Opinion in *Winner Wetten*, Advocate General Bot also wrote that, when the correctness of an assessment by the referring court could be doubted, he took the view that that circumstance is justification, 'in accordance with the spirit of cooperation which governs preliminary ruling proceedings and in order to inform the referring court of all the factors relating to the interpretation of Community law that may be helpful for deciding the case before it, for the Court to give the referring court guidance which will enable it to reconsider whether its premise is well founded'. [23]

65. In the present case, it may be useful to note two factors:

— first, according to the methodological criterion adopted by the Court in the judgment in *Brey* (C-140/12, EU:C:2013:565), for the purposes of Article 7(1)(b) of Directive 2004/38, the concept of 'social assistance system' must be defined by reference to the *objective* pursued by that provision and *not by reference to formal criteria*, [24] and

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

20 — See, inter alia, judgment in *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* (C-220/06, EU:C:2007:815, paragraph 36).

21 — Paragraph 41.

22 — Judgment in *Asociación Profesional de Empresas de Reparto y Manipulado de Correspondencia* (C-220/06, EU:C:2007:815, paragraph 36).

23 — C-409/06, EU:C:2010:38, paragraph 35.

24 — Paragraph 60.

— secondly, in accordance with the judgments in *Brey*[25] and *Dano*,[26] if it is to meet the definition of social assistance within the meaning of Directive 2004/38, the benefit in question must form part of an assistance scheme established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family.

66. Therefore, if the objective of the contested benefit fulfils the purpose set out in in the preceding point, it must be assessed as being social assistance within the meaning of Directive 2004/38.

67. In this regard, whilst Paragraph 19a of SGB I provides that both benefits to cover subsistence costs and benefits for integration into the labour market may be claimed under the entitlement to basic provision for jobseekers, Paragraph 1(1) of SGB II, entitled 'Function and objective of basic provision for jobseekers', states that 'basic provision for jobseekers is intended to enable its beneficiaries to lead a life in keeping with human dignity'.

68. Paragraph 1(3) of SGB II also states that the basic provision for jobseekers encompasses benefits intended to bring to an end, or reduce, need, in particular by integration into the labour market, and to cover subsistence costs.

69. However, according to Paragraph 19 of SGB II, the benefits at issue cover 'basic needs, additional needs and accommodation and heating needs'. The vocational integration assistance benefits are, for their part, contained, according to the referring court, in a specific chapter of SGB II.[27]

70. The condition regarding fitness for work, laid down in Paragraph 7 of SGB II and defined in Paragraph 8 of SGB II, in order to be eligible for basic provision benefits is, for its part, only a formal criterion for the award, in accordance with the judgment in *Brey* (C-140/12, EU:C:2013:565), referred to in point 65 of this Opinion. It has, therefore, no bearing on the classification of the measure.

71. It is merely an award criterion, in the same way as age and need, which is defined in Paragraph 9 of SGB II.

72. Lastly, should the national court find that the benefits claimed pursue a twofold objective, of ensuring that basic needs are met, on the one hand, and of facilitating access to the labour market, on the other, I share the view, expressed by the German, Italian and Swedish Governments in their written observations, that the decision must be based on the predominant function of the benefits, which, in the present case, is, unquestionably, to cover the subsistence costs necessary to lead a life in keeping with human dignity.

2. Interpretation of Article 24(2) of Directive 2004/38 the extent of the Member States' discretion in its transposition

a) The validity of the exception provided for in Article 24(2) of Directive 2004/38

73. Under Article 24(2) of Directive 2004/38, '[a] host Member State shall not be obliged to confer entitlement to social assistance during the first three months of residence or, where appropriate, the longer period provided for in Article 14(4)(b)', that is to say the period of seeking employment for Union citizens who have entered the territory of the host Member State for that purpose.

25 — Ibid. (paragraph 61).

26 — C-333/13, EU:C:2014:2358, paragraph 63.

27 — See footnote 16 of this Opinion.

74. Consequently, although 'Article 24(1) of Directive 2004/38 and Article 4 of Regulation No 883/2004 reiterate the prohibition of discrimination on grounds of nationality, *Article 24(2) of that directive contains a derogation from the principle of non-discrimination*'. [28]

75. With regard to the first three months referred to in that provision, the Court has confirmed, in the judgment in *Dano* (C-333/13, EU:C:2014:2358), that, '[i]n accordance with Article 24(2) of Directive 2004/38, the host Member State [wa]s … not obliged to confer entitlement to social benefits on a national of another Member State or his family members during that period'. [29]

76. In addition, with respect to the rights of nationals of Member States seeking employment in another Member State, that is to say, the second time period referred to in Article 24(2) of Directive 2004/38, the Court has already held that its examination with regard to the principle of non-discrimination had not 'disclosed any factor capable of affecting [its] validity'. [30]

77. In fact, unequal treatment between Union citizens who have made use of their freedom of movement and residence and nationals of the host Member State with regard to the grant of social benefits is 'an inevitable consequence of Directive 2004/38 [on account of] the link established by the Union legislature in Article 7 of the directive between the requirement to have sufficient resources as a condition for residence and the concern not to create a burden on the social assistance systems of the Member States'. [31]

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

79. However, the way in which that power is implemented warrants thorough examination. It is necessary to bear in mind the overall legal framework of which Directive 2004/38 forms part, as the Court noted in *Dano* (C-333/13, EU:C:2014:2358).

b) The place of Article 24 of Directive 2004/38 in the legal order of the Union

80. In its judgment in *Dano* (C-333/13, EU:C:2014:2358), the Court notes, 'first of all, that Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union (judgment in *N.*, C-46/12, EU:C:2013:97, paragraph 25)'. [32]

28 — Judgment in *Dano* (C-333/13, EU:C:2014:2358, paragraph 64). Emphasis added.

29 — Paragraph 70.

30 — Judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 46). It is true that that finding of validity was carried out in the light of Articles 12 EC and 39(2) EC (now Articles 18 TFEU and 45(2) TFEU). However, since '[e]very Union citizen may … rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in *all* situations falling within the scope *ratione materiae* of EU law' [see paragraph 59 of the judgment in *Dano* (C-333/13, EU:C:2014:2358), emphasis added], it seems to me that the finding of the validity of Article 24(2) of Directive 2004/38 applied by the Court cannot be restricted only to the situation of a 'worker' within the meaning of Article 45 TFEU.

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

32 — Paragraph 57.

81. It continues with reference to its settled case-law in accordance with which 'the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, enabling those among such nationals who find themselves in the same situation to enjoy within the scope *ratione materiae* of the FEU Treaty the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for in that regard (judgments in *Grzelczyk*, C-184/99, EU:C:2001:458, paragraph 31; *D'Hoop*, C-224/98, EU:C:2002:432, paragraph 28; and *N.*, C-46/12, EU:C:2013:97, paragraph 27)'. [33]

82. It follows from that case-law that '[e]very Union citizen may therefore rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in all situations falling within the scope *ratione materiae* of EU law. These situations include those relating to the exercise of the right to move and reside within the territory of the Member States conferred by point (a) of the first subparagraph of Article 20(2) TFEU and Article 21 TFEU (see judgment in *N.*, C-46/12, EU:C:2013:97, paragraph 28 and the case-law cited)'. [34]

83. The Court further adds that, '[i]n this connection, it is to be noted that Article 18(1) TFEU prohibits any discrimination on grounds of nationality "[w]ithin the scope of application of the Treaties, and without prejudice to any special provisions contained therein". The second subparagraph of Article 20(2) TFEU expressly states that the rights conferred on Union citizens by that article are to be exercised "in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder". Furthermore, under Article 21(1) TFEU too the right of Union citizens to move and reside freely within the territory of the Member States is subject to compliance with the "limitations and conditions laid down in the Treaties and by the measures adopted to give them effect" (see judgment in *Brey*, C-140/12, EU:C:2013:565, paragraph 46 and the case-law cited)'. [35]

84. Finally, the Court concludes that 'the principle of non-discrimination, laid down generally in Article 18 TFEU, is *given more specific expression* in Article 24 of Directive 2004/38 in relation to Union citizens who … exercise their right to move and reside within the territory of the Member States. That principle is also given more specific expression in Article 4 of Regulation No 883/2004 in relation to Union citizens … who invoke in the host Member State the benefits referred to in Article 70(2) of the regulation'. [36]

85. In other words, Article 24(2) of Directive 2004/38, which authorises differences in treatment between Union citizens and the nationals of the host Member State is a 'derogation from the principle of equal treatment provided for in Article 18 TFEU, of which Article 24(1) of [that] directive … is merely a specific expression'. [37] Therefore, it must be 'interpreted narrowly and in accordance with the provisions of the Treaty, including those relating to citizenship of the Union and the free movement of workers'.

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

33 — Ibid. (paragraph 58).

34 — Ibid. (paragraph 59).

35 — Judgment in *Dano* (C-333/13, EU:C:2014:2358, paragraph 60).

36 — Ibid. (paragraph 61). Emphasis added.

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

38 — See, in that regard, judgment in *Brey* (C-140/12, EU:C:2013:565, paragraph 57).

87. That consideration and those rules according to which, on the one hand, the exception must be interpreted restrictively and, on the other, the resulting limitations must be legitimate lead me to propose that a distinction be drawn between three situations:

— that of the national of a Member State who moves to the territory of another Member State and stays there for less than three months, or for more than three months but without pursuing the aim of seeking employment there (situation 1);

— that of the national of a Member State who moves to the territory of another Member State to seek employment there (situation 2); and

— that of the national of a Member State who has stayed in the territory of another Member State for more than three months and who has worked there (situation 3).

i) Situation 1: a national of a Member State who moves to the territory of another Member State and stays there for less than three months, or for more than three months but without pursuing the aim of seeking employment there

88. The first situation, taken as a whole, is that assessed by the Court in *Dano* (C-333/13, EU:C:2014:2358).

89. On the one hand, the Court held that, '[i]n accordance with Article 24(2) of Directive 2004/38, the host Member State [was] not obliged to confer entitlement to social benefits on a national of another Member State or his family members [for periods of residence of up to three months]'. [39]

90. That interpretation is consistent with the objective of maintaining the financial equilibrium of the social security system of the Member States pursued by Directive 2004/38. [40] Since the Member States cannot require Union citizens to have sufficient means of subsistence and personal medical cover for a three-month stay, it is legitimate not to require Member States to be responsible for them.

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

92. Moreover, the link with the host Member State is, in all likelihood, limited during that initial period.

93. On the other hand, the Court also held in the judgment in *Dano* (C-333/13, EU:C:2014:2358) that a Member State had to 'have the possibility, pursuant to Article 7 of Directive 2004/38, of refusing to grant social benefits to economically inactive Union citizens who exercise their right to freedom of movement solely in order to obtain another Member State's social assistance although they do not have sufficient resources to claim a right of residence'. [41]

ii) Situation 2: the national of a Member State who moves to the territory of another Member State to seek employment there

94. The distinction between the national of a Member State who moves in order to seek employment and the national of a Member State who has already entered the labour market is decisive.

39 — Judgment in *Dano* (C-333/13, EU:C:2014:2358, paragraph 70).

40 — See Recital 10 to that directive.

41 — Paragraph 78.

95. Indeed, although the referring court has limited its second and third questions to the interpretation of Article 4 of Regulation No 883/2004 and Article 24 of Directive 2004/38, and Articles 18 TFEU and 45(2) TFEU as well, '[that] situation does not prevent the Court from providing the referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions'. [42]

96. However, the Court has already held that, '[w]hile Member State nationals who move in search for work benefit from the principle of equal treatment only as regards access to employment, those who have already entered the employment market may, on the basis of Article 7(2) of Regulation [(EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community, [43] replaced by Article 7(2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [44]], claim the same social and tax advantages as national workers'. [45]

97. In the light of the grounds of the judgment in *Dano* (C-333/13, EU:C:2014:2358) concerning the balance of Directive 2004/38 [46] and of the distinction drawn in EU law and the Court's case-law between the worker who enters the territory of a Member State and the worker who has already entered that labour market, the legislation of a Member State, such as that at issue in the main proceedings, which excludes from entitlement to a special non-contributory cash benefit, within the meaning of Regulation No 883/2004 (a benefit which, moreover, constitutes social assistance within the meaning of Directive 2004/38), persons who move to the territory of that Member State in order to seek employment does not, in my view, run counter to Article 4 of that regulation or to the system established by that directive.

98. That exclusion is consistent, not only with the wording of Article 24(2) of Directive 2004/38, in that it authorises the Member States to refuse, beyond the period of the first three months of residence, to grant social assistance to the nationals of other Member States who have entered the territory of the host Member State to seek employment, but also with the objective difference — established in the case-law of the Court and, inter alia, in Article 7(2) of Regulation No 492/2011 — between the situation of nationals seeking their first job in the territory of the host Member State and that of those who have already entered the [labour] market. [47]

iii) Situation 3: a national of a Member State who has stayed in the territory of another Member State for more than three months and has worked there

99. The automatic effect of exclusion from entitlement to social assistance linked to the loss of the status of 'worker' raises more problems.

100. According to the findings of the referring court, since their arrival in Germany in June 2010, Ms Alimanovic and her daughter Sonita have worked only in short-term jobs or under employment-promotion measures for less than a year. Since May 2011 they have not worked (either as employees or self-employed). Therefore, they lost their status of 'worker' in December 2011.

101. Under the second sentence of Paragraph 2(3) of the FreizügG/EU, Union citizens who have worked for less than one year retain their right of residence in German territory for six months in the event of involuntary unemployment confirmed by the relevant employment office.

42 — Judgment in *Alokpa and Moudoulou* (C-86/12, EU:C:2013:645, paragraph 20)

43 — OJ 1968 L 257, p. 2.

44 — OJ 2011 L 141, p. 1.

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

46 — Paragraphs 67 to 79.

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

102. No longer having the status of 'worker', Ms Alimanovic and her daughter Sonita were again regarded as jobseekers. Accordingly, they automatically fell once more within the ambit of point 2 of the second sentence of Paragraph 7(1) of SGB II, which excludes the long-term unemployed from entitlement to subsistence allowances. Consequently, her two other children, Valentina and Valentino, also lost their secondary entitlement to social assistance to cover their subsistence costs under SGB II.

103. If loss of the status of worker seems to be an appropriate, albeit restrictive, transposition of Article 7(3)(c) of Directive 2004/38,[48] its automatic consequences for entitlement to subsistence benefits under SGB II seem to go beyond the general system established by that directive.

104. In paragraph 77 of its judgment in *Brey* (C-140/12, EU:C:2013:565), the Court held that a 'mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit, even for the period following the first three months of residence referred to in Article 24(2) of Directive 2004/38, does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out — in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality — an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned'.

105. Contrary to what was argued at the hearing on 3 February 2015 by certain Governments, if in that paragraph of its judgment the Court refers to provisions of Directive 2004/38 regarding the right of residence for a period of longer than three months, the requirement of an individual examination actually concerns the application for social assistance and not the lawfulness of the residence.

106. Consequently, in accordance with that case-law, it is important that the competent authorities of the host Member State, when examining the application of a Union citizen, economically inactive and in a situation like that of Ms Alimanovic and her daughter Sonita, take into account, inter alia, not only the amount and regularity of the income received by the citizen of the Union, but also the period during which the benefit applied for is likely to be granted to them.[49]

107. Moreover, in the same way as the Court has developed case-law that permits the entitlement of economically inactive citizens of the Union to certain benefits to be made subject to a requirement of integration in the host Member State,[50] the demonstration of a *real link* with that State ought to prevent automatic exclusion from those benefits.

108. In that case-law, the Court has previously held that a single condition that is too general and exclusive in nature, in that it unduly favours an element not necessarily representative of the real and effective degree of connection between the applicant for the allowance and the geographic market in question, to the exclusion of all other representative elements, went beyond what was necessary in order to attain the aim pursued.[51]

48 — Under Article 7(3)(c) of Directive 2004/38, a Union citizen who is no longer a worker or self-employed person is to retain the status of worker or self-employed person [if] 'he/she is in duly recorded involuntary unemployment after completing a fixed-term employment contract of less than a year or after having become involuntarily unemployed during the first twelve months and has registered as a job-seeker with the relevant employment office. In this case, the status of worker shall be retained for no less than six months'.

49 — See, to that effect, judgment in *Brey* (C-140/12, EU:C:2013:565, paragraphs 78 and 79).

50 — See, in that regard, on the subject of maintenance costs for students, judgments in *Bidar* (C-209/03, EU:C:2005:169, paragraph 57) and *Förster* (C-158/07, EU:C:2008:630, paragraph 49). See also, on the subject of tideover allowances granted to young persons seeking their first job or jobseeker's allowance, judgments in *Collins* (C-138/02, EU:C:2004:172, paragraph 67); *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344, paragraph 38); and *Prete* (C-367/11, EU:C:2012:668).

51 — See, in that regard, judgment in *Prete* (C-367/11, EU:C:2012:668, paragraph 34 and the case-law cited).

109. According to the Court, matters that can be inferred from family circumstances, like the existence of close ties of a personal nature, are also such as to contribute to the appearance of a lasting connection between the person concerned and the new host Member State. [52] Accordingly, national legislation establishing a condition that 'prevents other factors which are potentially representative of the real degree of connection of the claimant with the relevant geographic labour market being taken into account … goes beyond what is necessary to achieve its aim'. [53]

110. In the light of the foregoing, it is contrary to EU law, and more precisely, to the principle of equal treatment affirmed in Article 18 TFEU and clarified in Article 4 of Regulation No 883/2004 and Article 24 of Directive 2004/38, for the legislation of a Member State, such as that at issue in the main proceedings, automatically to exclude a citizen of the Union from entitlement to a special non-contributory cash benefit within the meaning of Regulation No 883/2004 (a benefit which, moreover, constitutes social assistance within the meaning of Directive 2004/38) beyond a period of involuntary unemployment of six months after working for less than a year, without allowing that citizen to demonstrate the existence of a genuine link with the host Member State.

111. In that regard, in addition to matters that can be inferred from family circumstances (such as the children's education), the fact that the person concerned has, for a reasonable period, in fact genuinely sought work is a factor capable of demonstrating the existence of that link with the host Member State. [54] Having worked in the past, or even the fact of having found a new job after applying for the grant of social assistance, ought also to be taken into account in that connection.

3. Brief analysis with regard to Article 45 TFEU

112. I should state again, for whatever purpose it may serve, that if the Court left it to the national court to classify the basic provision benefits under EU law and the national court took the view that those benefits were essentially intended to facilitate access to the labour market, the same reasoning should apply.

113. As I have noted, the Court has consistently held that it is 'no longer possible to exclude from the scope of Article [45(2) TFEU] — which expresses the fundamental principle of equal treatment, guaranteed by Article [18 TFEU] — a benefit of a financial nature intended to facilitate access to employment in the labour market of a Member State'. [55]

114. However, the Court has also held, in its judgment in *Vatsouras and Koupatantze* (C-22/08 and C-23/08, EU:C:2009:344), that it was 'legitimate for a Member State to grant such an allowance only after it has been possible to establish a real link between the job-seeker and the labour market of that State'. [56]

115. As I have stated above, the existence of such a link can be determined, in particular, by establishing that the person concerned has, for a reasonable period, in fact genuinely sought work in the Member State in question. [57]

52 — Ibid. (paragraph 50).

53 — Ibid. (paragraph 51).

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

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

56 — Paragraph 38.

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

116. In those circumstances, 'nationals of the Member States seeking employment in another Member State who have established real links with the labour market of that State can rely on Article [45(2) TFEU] in order to receive a benefit of a financial nature intended to facilitate access to the labour market', [58] a finding which it is for the competent national authorities and, where appropriate, the national courts to make.

4. Considerations in the alternative concerning the situation of the child of a national of a Member State who has moved to another Member State with a view to seeking employment there

117. According to the referring court's legal and factual explanation, Ms Alimanovic having been regarded as a jobseeker in accordance with Paragraph 2(2)(1) of the FreizügG/EU since December 2011, she has lost her personal entitlement to receive subsistence allowances for the long-term unemployed. Her two younger children, Valentina and Valentino, have, accordingly, also lost their entitlement to receive social assistance to cover subsistence costs under SGB II, for point 2 of the second sentence of Paragraph 7(1) of SGB II excludes from entitlement to subsistence benefits 'foreign nationals whose right of residence arises solely out of the search for employment *and their family members*'. [59]

118. As I have stated above, although the referring court has limited its second and third questions to the interpretation of Article 4 of Regulation No 883/2004 and Article 24 of Directive 2004/38 and also Articles 18 TFEU and 45(2) TFEU, that fact does not prevent the Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating on the case before it, whether or not that court has specifically referred to them in the questions.

119. In accordance with settled case-law, the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer may claim a right of residence in the latter State on the sole basis of Article 10 of Regulation No 492/2011. [60]

120. That right of residence of the children is classified as 'independent' by the case-law, because it is linked solely to their right of access to education, [61] the Court having expressly held that Directive 2004/38 did not make the right of residence of children who are in education and the parent who is their primary carer dependent on their having sufficient resources and comprehensive sickness insurance cover [62] or, more generally, on the conditions laid down in Directive 2004/38. [63]

121. In consequence, if it has been demonstrated, which it is for the national court to ascertain, that Valentina and Valentino Alimanovic are duly continuing their education within an establishment situated in Germany, they — like their mother, Nazifa Alimanovic — have a right of residence in Germany, despite the expiry of the six-month period laid down in the second sentence of Paragraph 2(3) of the FreizügG/EU.

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

59 — Emphasis added.

60 — See, in that regard, judgments in *Ibrahim and Secretary of State for the Home Department* (C-310/08, EU:C:2010:80, paragraph 59); *Teixeira* (C-480/08, EU:C:2010:83, paragraph 36); and *Alarape and Tijani* (C-529/11, EU:C:2013:290, paragraph 26). The provision that applied to those cases was Article 12 of Regulation No 1612/68, now repealed by Regulation No 492/2011. However, the case-law relied on remains relevant, for Article 10 of that new regulation is identical to Article 12 of Regulation No 1612/68. Under the first subparagraph of that article, '[t]he children of a national of a Member State who is or has been employed in the territory of another Member State shall be admitted to that State's general educational, apprenticeship and vocational training courses under the same conditions as the nationals of that State, if such children are residing in its territory'.

61 — See, in that regard, judgments in *Baumbast and R* (C-413/99, EU:C:2002:493, paragraph 63); *Ibrahim and Secretary of State for the Home Department* (C-310/08, EU:C:2010:80, paragraph 35); and *Teixeira* (C-480/08, EU:C:2010:83, paragraphs 36 and 46).

62 — See, in that regard, judgments in *Ibrahim and Secretary of State for the Home Department* (C-310/08, EU:C:2010:80, paragraphs 56 and 59) and *Teixeira* (C-480/08, EU:C:2010:83, paragraph 70).

63 — See, in that regard, judgment in *Teixeira* (C-480/08, EU:C:2010:83, paragraph 61).

122. In those circumstances, point 2 of the second sentence of Paragraph 7(1) of SGB II is not applicable to the situation of Ms Alimanovic or to that of her two younger children, for that provision applies only to persons 'whose right of residence arises solely out of the search for employment and their family members'.

VI – Conclusion

123. The right to move and work is a fundamental and absolute freedom of EU law. That said, the Union legislature took the view that it was necessary to provide a framework for the right of residence of nationals of Member States.

124. To that end, Article 7 of Directive 2004/38 provides, in essence, that all Union citizens have the right of residence in the territory of another Member State for a period longer than three months if they are workers or self-employed persons in the host Member State, or have sufficient resources for themselves and the members of their family 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 that State.

125. As evidence of the fundamental nature of the freedom of movement and right of residence arising from it, Article 14 of Directive 2004/38 strictly limits the possibilities of removing a citizen who does not satisfy the abovementioned conditions.

126. In the light of the foregoing consideration, I propose that the Court answer the questions referred for a preliminary ruling from the Bundessozialgericht as follows:

(1) Article 24(2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC must be interpreted as not precluding legislation of a Member State which excludes from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, as amended by Regulation No 1244/2010 (and which also constitute 'social assistance' within the meaning of Directive 2004/38), nationals of other Member States who have a right of residence beyond three months to seek employment on the basis of Article 14(4)(b) of Directive 2004/38, although those benefits are granted to nationals of the host Member State who are in the same situation.

(2) Article 24(2) of Directive 2004/38 must be interpreted as precluding legislation of a Member State, which, automatically and without individual assessment, excludes from entitlement to certain 'special non-contributory cash benefits' within the meaning of Article 70(2) of Regulation No 883/2004, as amended by Regulation No 1244/2010 (and which also constitute 'social assistance' within the meaning of Directive 2004/38), nationals of other Member States who are seeking employment in the territory of the host Member State after entering that labour market, although those benefits are granted to nationals of the host Member State who are in the same situation.

(3) In circumstances such as those of the main proceedings, the children of a national of a Member State who works or has worked in the host Member State and the parent who is their primary carer may claim a right of residence in the latter State on the sole basis of Article 10 of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, without such a right being conditional on their having sufficient resources and comprehensive sickness insurance cover in that State.