



## Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

10 June 2021\*

(Reference for a preliminary ruling – Directive 2003/109/EC – Status of third-country nationals who are long-term residents – Article 11 – Right to equal treatment as regards social security, social assistance and social protection – Derogation from the principle of equal treatment in respect of social assistance and social protection – Concept of ‘core benefits’ – Directive 2000/43/EC – Principle of equal treatment between persons irrespective of racial or ethnic origin – Article 2 – Concept of discrimination – Article 21 of the Charter of Fundamental Rights of the European Union – Legislation of a Member State subjecting the grant of housing assistance to third-country nationals who are long-term residents to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State)

In Case C-94/20,

REQUEST for a preliminary ruling under Article 267 TFEU from the Landesgericht Linz (Regional Court, Linz, Austria), made by decision of 6 February 2020, received at the Court on 25 February 2020, in the proceedings

**Land Oberösterreich**

v

**KV**

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász, C. Lycourgos and I. Jarukaitis (Rapporteur), Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– Land Oberösterreich, by K. Holzinger, Rechtsanwältin,

\* Language of the case: German.

– KV, by S. Scheed, Rechtsanwältin,  
– the European Commission, by C. Cattabriga, D. Martin and B.-R. Killmann, acting as Agents,  
after hearing the Opinion of the Advocate General at the sitting on 2 March 2021,  
gives the present

## Judgment

- 1 The present request for a preliminary ruling concerns the interpretation of Article 11 of 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), of Article 2 of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin (OJ 2000 L 180, p. 22) and of Article 21 of the Charter of Fundamental Rights of the European Union ('the Charter').
- 2 The request has been made in proceedings between KV and Land Oberösterreich (province of Upper Austria, Austria) concerning a claim for compensation in respect of the harm allegedly incurred by KV as a result of the refusal to grant him housing assistance ('housing assistance').

## Legal framework

### *EU law*

#### *Directive 2000/43*

- 3 Article 1 of Directive 2000/43, entitled 'Purpose', provides:  
'The purpose of this Directive is to lay down a framework for combating discrimination on the grounds of racial or ethnic origin, with a view to putting into effect in the Member States the principle of equal treatment.'
- 4 Article 2 of that directive, entitled 'Concept of discrimination', provides:
  1. For the purposes of this Directive, the principle of equal treatment shall mean that there shall be no direct or indirect discrimination based on racial or ethnic origin.
  2. For the purposes of paragraph 1:
    - (a) direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation on grounds of racial or ethnic origin;

(b) indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.

...'

5 Article 3 of Directive 2000/43, entitled 'Scope', provides, in paragraph 2 thereof:

'This Directive does not cover differences of treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.'

***Directive 2003/109***

6 Recitals 2, 4, 12 and 13 of Directive 2003/109 are worded as follows:

'(2) The European Council, at its special meeting in Tampere [(Finland)] on 15 and 16 October 1999, stated that the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.

...

(4) The integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the [European Union] stated in the [FEU] Treaty.

...

(12) In order to constitute a genuine instrument for the integration of long-term residents into the society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive.

(13) With 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.'

7 Under Article 2 of that directive, entitled ‘Definitions’:

‘For the purposes of this Directive:

- (a) “third-country national” means any person who is not a citizen of the Union within the meaning of Article [20](1) [TFEU];
- (b) “long-term resident” means any third-country national who has long-term resident status as provided for under Articles 4 to 7 [of that directive];

...’

8 Article 11 of Directive 2003/109, entitled ‘Equal treatment’, provides:

‘1. Long-term residents shall enjoy equal treatment with nationals as regards:

...

- (d) social security, social assistance and social protection as defined by national law;

...

4. Member States may limit equal treatment in respect of social assistance and social protection to core benefits.

...’

### *Austrian law*

#### *The oöWFG*

9 The Land Oberösterreich grants housing assistance, the conditions for the grant of which were governed by the following provisions of the Oberösterreichisches Wohnbauförderungsgesetz (Upper Austrian Law on Housing Construction Subsidies) (LGBl. 6/1993), in the version applicable to the dispute in the main proceedings (‘the oöWFG’). Paragraph 6 of the oöWFG provided:

‘...

(9) Support under this Law shall be granted to Austrian citizens, nationals of a Member State of the [European Economic Area (EEA)] and Union citizens and their family members within the meaning of Directive 2004/38/EC [of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC,

90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77)]. Unless an international convention requires them to be granted support in the same way as to Austrian citizens, support may be granted only to other persons if they:

1. have their principal residence lawfully for a continuous period of more than five years in Austrian territory,
2. receive income subject to income tax in Austria or paid contributions to the compulsory social insurance scheme in Austria for having pursued an occupational activity and now receive benefits from that scheme, and received that income or benefit for 54 months during the previous 5 years, and
3. provide evidence of their basic knowledge of the German language in accordance with subparagraph 11.

...

(11) The condition laid down in subparagraph 9(3) shall be considered satisfied where the applicant

1. produces a certificate from the Österreichischer Integrationsfonds (Austrian integration fund, Austria; 'ÖIF') or an examination institution certified by ÖIF attesting success in an integration examination, or
2. produces a generally recognised language diploma or a certificate of basic knowledge of A2-Level German issued by an examination centre certified in accordance with the Integrationsvereinbarungs-Verordnung (Integration Convention) (BGBl. II, 242/2017), or
3. produces proof that he or she pursued compulsory education in Austria for at least five years and obtained a sufficient mark in the subject "German" or the subject "German" has been successfully completed at the 9th grade level, or
4. has passed the examination at the end of apprenticeship in accordance with the Berufsausbildungsgesetz (Law on Vocational Training for apprenticeship) (BGBl. 142/1969).

...'

10 Paragraph 23 of the oöWFG provided:

'(1) Housing assistance may be granted to the main tenant, to the purchaser in the state of future completion and to the owner of a dwelling in respect of which support has been granted, where

1. the applicant cannot reasonably be required to bear the burden of the cost of accommodation,
2. the applicant lives permanently in the dwelling concerned in order to meet his or her accommodation needs, and
3. the applicant has applied for other aid to reduce expenditure on accommodation (Paragraph 24(1)) which he or she is entitled to receive, and

4. repayment of the support loan (Paragraph 9) or a subsidised mortgage loan (Paragraph 10) has already commenced.

(2) The housing assistance may be granted to the main tenant of a dwelling in respect of which no support has been granted if the conditions laid down in subparagraph 1(1) to (3) are satisfied and the lease has not been concluded with a related person.

...'

### ***The oberösterreichische Wohnbeihilfen-Verordnung***

- 11 In accordance with Paragraph 2(3) of the Oberösterreichische Wohnbeihilfen-Verordnung (Upper Austrian Ordinance on Social Housing Assistance), in the version applicable to the dispute in the main proceedings, the amount of housing assistance was capped at EUR 300 per month.

### ***The oöBMSG***

- 12 Persons in a situation of social distress could receive a guarantee of minimum resources to cover their needs under the Oberösterreichisches Mindestsicherungsgesetz (Upper Austrian Law on Guaranteed Minimum Resources) (BGBl. 74/2011), in the version applicable to the dispute in the main proceedings ('the oöBMSG'), Paragraph 1 of which stated that the purpose of that guarantee was to guarantee a decent existence to those who needed support from the community in that regard and to ensure the lasting integration into society which that entailed. Under certain conditions, such a benefit could be received in addition to, or be partially offset against, housing assistance. The basic amount of that benefit during 2018 was EUR 921.30 per month for a person living alone and EUR 649.10 for adults living in a household, with complementary benefits granted for children.
- 13 Paragraph 4 of the oöBMSG provided:

'(1) In so far as this Law does not provide otherwise, the minimum resources guarantee to cover needs may be granted only to those who

1. have their habitual residence in Upper Austria ... and

2.

- (a) are Austrian nationals or members of the family of Austrian nationals;
- (b) have the right to asylum or subsidiary protection;
- (c) are Union citizens, nationals of a Member State of the [EEA], Swiss nationals or their family members, provided that receipt of those benefits does not cause them to lose their right of residence;
- (d) have a long-term resident's [EU] residence permit or a "long-term resident – family member" permit, or a certificate of establishment or an indefinite residence permit;
- (e) have a different right of permanent residence in Austrian territory, provided that receipt of those benefits does not cause them to lose their right of residence.'

14 Under Paragraph 5 of the oöBMSG:

‘The grant of the minimum resources guarantee to cover needs shall be subject to the condition that a person meeting the conditions laid down in Paragraph 4

(1) is in a situation of social distress (Paragraph 6), and

(2) is prepared to try to avoid, mitigate or overcome that situation of social distress (Paragraph 7).’

15 Paragraph 6 of the oöBMSG provided:

‘(1) Persons are in a situation of social distress where they are unable to provide

1. for their own subsistence and accommodation, or

2. for the subsistence and accommodation needs of dependent family members living with them within the same household,

or to provide, within that framework, the cover required in the event of illness, pregnancy and giving birth.

(2) The subsistence needs referred to in subparagraph 1 include expenditure relating to the periodic needs that a decent existence entails, in particular food, clothing, personal hygiene, household furniture and equipment, heating, electricity, and other personal needs, such as the need to take part in an appropriate manner in social and cultural life.

(3) The accommodation requirements referred to in subparagraph 1 include periodic rent, general charges and taxes necessary to ensure appropriate accommodation.

...’

### ***The oöADG***

16 The Oberösterreichisches Antidiskriminierungsgesetz (Upper Austrian Non-Discrimination Law) (LGBl. 50/2005), in the version applicable to the dispute in the main proceedings (‘the oöADG’), transposed Directive 2000/43 into Austrian law. Paragraph 1 of the oöADG, entitled ‘Prohibition of discrimination’, prohibits any direct or indirect discrimination against natural persons on grounds of, inter alia, ethnicity. By virtue of Paragraph 3 of the oöADG, Paragraph 1 thereof does not apply to inequalities in treatment on grounds of nationality, provided that these are imposed by law or are objectively justified and that rules of the European Union or international conventions forming part of the framework of European integration relating to the equality of persons do not preclude such treatment.

17 Under Paragraph 8 of the oöADG:

‘(1) In the event of a breach of the prohibition of discrimination on the grounds referred to in Paragraph 1, the person placed at a disadvantage has ... the right to appropriate compensation ...

In addition to compensation for material damage, he or she is also entitled to appropriate compensation for the personal injury suffered. The amount of compensation for the personal injury suffered cannot be less than EUR 1 000.

...'

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

- 18 KV, a Turkish national, has lived since 1997 with his wife and their three children in Austria where he has 'long-term resident status' within the meaning of Article 2(b) of Directive 2003/109. Up to the end of 2017, he received housing assistance pursuant to the oöWFG. Since eligibility for that assistance for third-country nationals has been subject, since 1 January 2018, in accordance with Paragraph 6(9) and (11) of the oöWFG, to the condition that the third-country national provides proof, in a form specified by that legislation, that he or she has a basic command of German, KV has been refused that assistance since that date on the ground that he did not provide the requisite proof.
- 19 KV then brought an action before the Bezirksgericht Linz (District Court, Linz, Austria) seeking an order that the Land Oberösterreich pay him compensation corresponding to the amount of the loss of housing assistance for the period from January to November 2018, namely EUR 281.54 per month, and to compensation for non-material harm in the amount of EUR 1 000. In support of his claims, he relied on Paragraph 8 of the oöADG and maintained, firstly, that Paragraph 6(9)(3) and Paragraph 6(11) of the oöWFG unjustifiably placed him at a disadvantage by reason of his ethnic origin, and, secondly, that housing assistance was a 'core benefit' within the meaning of Article 11(4) of Directive 2003/109.
- 20 After those claims had been upheld by the Bezirksgericht Linz (District Court, Linz), the Land Oberösterreich brought an appeal before the referring court, the Landesgericht Linz (Regional Court, Linz, Austria).
- 21 That court states, as a preliminary point, that its first and second questions should be answered independently of each other for the purpose of resolving the dispute before it. If housing assistance is to be regarded as a 'core benefit' within the meaning of Article 11(4) of Directive 2003/109, an answer to the second question referred would nevertheless be useful for it, since KV bases his action on his right to compensation under Paragraph 8(1) of the oöADG and claims both payment of the amount of housing assistance not received and compensation for non-material harm suffered due to the fact that he was discriminated against on account of his ethnicity. Even if that assistance is not to be regarded as a 'core benefit' within the meaning of Article 11(4) of Directive 2003/109, it is nevertheless conceivable, in the referring court's view, that the rule laid down in Paragraph 6(9) and (11) of the oöWFG amounts to discrimination prohibited under Directive 2000/43 or infringes the Charter. The referring court takes the view that, in exercising the option to apply the derogation provided for in Article 11(4) of that directive, the Land Oberösterreich, when determining the specific modalities for granting housing assistance, was required to comply with other requirements of EU law and of Directive 2000/43 and the Charter and could not apply discriminatory criteria. According to the referring court, the question as to whether Paragraph 6(9) and (11) of the oöWFG is contrary to Directive 2000/43 or to the Charter must therefore be assessed independently of Article 11 of Directive 2003/109.



- 22 Seeking, first of all, to determine whether housing assistance is a ‘core benefit’ within the meaning of Article 11(4) of Directive 2003/109, the referring court states that the Ausschuss für Wohnbau, Baurecht und Naturschutz (Committee for Housing, Construction Law and Protection of the Environment) of the Oberösterreichischer Landtag (Parliament of the province of Upper Austria, Austria) declared, in its report on a draft law which amended the oöWFG in 2013, that housing construction subsidies, including housing assistance, were not such a benefit. It takes the view that that committee thus expressed the intention of the Parliament of the province of Upper Austria to make use of the option to apply the derogation provided for in that provision. It points out that third-country nationals who are long-term residents have not, however, generally been excluded from entitlement to housing assistance, but that additional conditions have been imposed on those nationals. It states that it is not, however, bound by the interpretation of Article 11(4) of Directive 2003/109 made by the committee in question.
- 23 Referring to the judgment of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233), the referring court considers that the application of the principles laid down in that judgment to housing assistance is not clear.
- 24 The referring court states that the guaranteed minimum benefits provided for by the oöBMSG are intended generally to enable persons suffering social hardship to lead a decent existence, which includes access to housing. The grant of such a benefit is subject to significantly stricter conditions than those for the grant of housing assistance, since guaranteed minimum benefits may be granted only to individuals without any income or on extremely low incomes. The grant of guaranteed minimum benefits therefore requires a significantly higher degree of social need than that capable of justifying the grant of housing assistance. Thus, individuals on incomes that, while being low, are capable of covering their minimum subsistence level, may receive housing assistance without receiving the benefit granted in respect of guaranteed minimum benefits. In certain cases, it is possible to receive both guaranteed minimum benefits and housing assistance, with the former being partially offset against the latter, but the target group of those benefits is not, however, identical.
- 25 The referring court is unsure whether only the benefits provided for by the oöBMSG are to be regarded as ‘core benefits’ within the meaning of Article 11(4) of Directive 2003/109, or whether housing assistance may also be regarded as such a benefit given that the latter is also intended to reduce the burden resulting from housing costs where that burden is unreasonable and despite the fact that, unlike guaranteed minimum benefits, that assistance does not require the interested party to be suffering social hardship.
- 26 As regards, next, the alleged discrimination based on racial or ethnic origin, the referring court states that the oöADG transposes into Austrian law, in so far as relevant for the purposes of the case in the main proceedings, Directive 2000/43, although the oöADG refers to ‘ethnicity’. Noting that a difference in treatment based on the criterion of status as a third-country national does not, in principle and as such, come within the scope of that directive in accordance with Article 3(2) thereof, it asks whether a criterion of nationality may nevertheless, under certain conditions, constitute ‘indirect discrimination’ based on ethnic origin within the meaning of Article 2(2)(b) of Directive 2000/43. It observes, in this regard, that it is required to deliver a decision on a rule which requires the possession of a basic command of German, proof of which must be provided in a specified form. In the event that it is necessary to assess whether the oöWFG gives rise to indirect discrimination, the referring court adds that it would need to examine whether such discrimination is justified. The purpose of Paragraph 6(9) and (11) of the oöWFG is to provide for more restricted access to housing assistance for third-country nationals

and the ground concerning the possession of a basic command of German is that that level of proficiency is an important element for purposes of the social integration of the person concerned. According to the referring court, it is worth considering the requirement to provide proof of such a level of proficiency in the light of the other eligibility conditions for housing assistance and of the requirements that the third-country national concerned must satisfy in order to obtain ‘long-term resident status’ within the meaning of Article 2(b) of Directive 2003/109.

- 27 Lastly, should the Court take the view that Directive 2000/43 does not apply to the situation at issue in the main proceedings, the question arises, according to the referring court, as to whether the rule laid down in Paragraph 6(9) and (11) of the oöWFG must be examined in the light of Article 21 of the Charter. It appears to the referring court that the specific modalities of such a rule must be determined in the light of the requirements of the Charter, as that court takes the view that the case in the main proceedings comes within the scope thereof by reason of the fact that there are rules of EU law which require that social benefits be paid to third-country nationals who are long-term residents and that the national legislation at issue in the main proceedings may be regarded as legislation implementing those rules.
- 28 In those circumstances, the Landesgericht Linz (Regional Court, Linz) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

- ‘(1) Is Article 11 of [Directive 2003/109] to be interpreted as precluding national legislation, such as Paragraph 6(9) and (11) of the [oöWFG], which allows EU citizens, EEA nationals and family members within the meaning of [Directive 2004/38] to receive a social benefit in the form of housing assistance without proof of language proficiency, while requiring third-country nationals with long-term resident status within the meaning of [Directive 2003/109] to provide particular proof of a basic command of German, where that housing assistance is intended to absorb unreasonable burdens in the form of housing costs even though minimum subsistence levels (including the need for housing) should also be ensured by way of another social benefit (needs-based guaranteed minimum benefits in accordance with the [oöBMSG]) for individuals suffering social hardship?
- (2) Is the prohibition of direct or indirect discrimination based on “racial or ethnic origin” in accordance with Article 2 of [Directive 2000/43] to be interpreted as precluding national legislation, such as Paragraph 6(9) and (11) of the oöWFG, which allows EU citizens, EEA nationals and family members within the meaning of [Directive 2004/38] to receive a social benefit (housing assistance in accordance with the oöWFG) without proof of language proficiency, while requiring third-country nationals (including those with long-term resident status within the meaning of [Directive 2003/109]) to provide particular proof of a basic command of German?
- (3) If the answer to Question 2 is in the negative:

Is the principle of non-discrimination on grounds of ethnic origin in accordance with Article 21 of the [Charter] to be interpreted as precluding national legislation such as Paragraph 6(9) and (11) of the oöWFG, which allows EU citizens, EEA nationals and family members within the meaning of [Directive 2004/38] to receive a social benefit (housing assistance in accordance with the oöWFG) without proof of language proficiency, while requiring third-country nationals (including those with long-term resident status within the meaning of [Directive 2003/109]) to provide particular proof of a basic command of German?’

### **Application for the oral part of the procedure to be reopened**

- 29 Following delivery of the Advocate General’s Opinion, the Land Oberösterreich, by document lodged at the Court Registry on 12 March 2021, requested that the oral part of the procedure be reopened pursuant to Article 83 of the Rules of Procedure of the Court of Justice. In support of its application, the Land Oberösterreich submits, in essence, that the classification of housing assistance as a ‘core benefit’ within the meaning of Article 11(4) of Directive 2003/109, made by the Advocate General, is incorrect. The Land Oberösterreich argues that that classification is contrary both to that provision and to the case-law of the Court, and is also at variance with the purpose of that benefit. Furthermore, it submits, the Advocate General’s Opinion is contradictory and is based on matters which have not been proved or which have not been invoked. Moreover, as regards proof of the possession of a basic command of German, which the applicant for housing assistance must provide, the Land Oberösterreich disputes that there may be forms of proof other than those already accepted under national legislation.
- 30 In that regard, it should be noted, first, that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court of Justice make no provision for the interested parties referred to in Article 23 of that statute to submit observations in response to the Advocate General’s Opinion (judgment of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 63 and the case-law cited).
- 31 Second, under the second paragraph of Article 252 TFEU, the Advocate General, acting with complete impartiality and independence, is required to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require the Advocate General’s involvement. The Court is not bound either by the Advocate General’s submissions or by the reasoning which led to those submissions. As a consequence, the fact that a party disagrees with the Advocate General’s Opinion, irrespective of the questions examined in the Opinion, cannot in itself constitute a ground justifying the reopening of the oral part of the procedure (judgments of 4 December 2019, *Consorzio Tutela Aceto Balsamico di Modena*, C-432/18, EU:C:2019:1045, paragraph 21, and of 2 March 2021, *A.B. and Others (Appointment of judges to the Supreme Court – Actions)*, C-824/18, EU:C:2021:153, paragraph 64).
- 32 However, pursuant to Article 83 of the Rules of Procedure, the Court may at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, in particular if it considers that it lacks sufficient information or where a party has, after the close of that part of the procedure, submitted a new fact which is of such a nature as to be a decisive factor for the decision of the Court, or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union.
- 33 In the present case, the Court takes the view, however, after hearing the Advocate General, that it has, following the written part of the procedure, all the information necessary in order to give judgment. It notes, moreover, that the present case does not have to be decided on the basis of an argument which has not been debated between the parties. It considers, lastly, that the application to have the oral part of the procedure reopened does not disclose any new fact that is capable of having an influence on the decision that it is called upon to deliver in the present case. In those circumstances, there is no need to order the reopening of the oral part of the procedure.

## The questions referred

### *First question referred*

- 34 It is apparent from the order for reference that, in its first question, the referring court starts from the premiss that housing assistance is one of the benefits referred to in Article 11(1)(d) of Directive 2003/109 and that the authorities responsible for the implementation of that directive stated clearly that they intended to rely on the derogation provided for in Article 11(4) of that directive, this being a matter for that court to determine.
- 35 In those circumstances, it must be stated that, by its first question, the referring court asks, in essence, whether Article 11(1)(d) of Directive 2003/109 must be interpreted as precluding, even where use has been made of the option to apply the derogation provided for in Article 11(4) of that directive, legislation of a Member State under which the grant of housing assistance to third-country nationals who are long-term residents is subject to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State.
- 36 In that regard, the referring court seeks to ascertain, primarily, whether housing assistance must be regarded as a ‘core benefit’ within the meaning of Article 11(4) of Directive 2003/109.
- 37 In accordance with that provision, Member States may limit to core benefits, in respect of social assistance and social protection, equal treatment between ‘long-term residents’ within the meaning of that directive and nationals. Since the integration of third-country nationals who are long-term residents in the Member States and the right of those nationals to equal treatment in the sectors listed in Article 11(1) of Directive 2003/109 constitute the general rule, the derogation provided for in Article 11(4) thereof must be interpreted strictly (see, to that effect, judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 86).
- 38 As regards the concept of ‘core benefit’ within the meaning of Article 11(4) of Directive 2003/109, it should be borne in mind that, in the absence of a definition of that concept in that directive and of a reference to national law in that regard, the meaning and scope of that concept must be sought by taking into account the context of that provision and the objective pursued by Directive 2003/109, namely, as is apparent in particular from recitals 2, 4 and 12 thereof, the integration of third-country nationals who have resided legally and continuously in the Member States. That provision must be understood as allowing Member States to limit the equal treatment enjoyed by holders of the status conferred by that directive, with the exception of social assistance or social protection benefits granted by the public authorities, at national, regional or local level, which enable interested parties to meet their basic needs such as food, accommodation and health (see, to that effect, judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraphs 90 and 91).
- 39 Furthermore, when determining the social security, social assistance and social protection measures defined by their national law and subject to the principle of equal treatment enshrined in Article 11(1)(d) of Directive 2003/109, the Member States must comply with the rights and observe the principles provided for under the Charter, including those laid down in Article 34 thereof. According to Article 34 of the Charter, the European Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. It follows that, in so far as a benefit fulfils the purpose set out in that article

of the Charter, it cannot be regarded, under EU law, as not forming part of the ‘core benefits’ within the meaning of Article 11(4) of Directive 2003/109 (judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraphs 80 and 92).

- 40 It follows that, as the Advocate General noted in point 53 of his Opinion, a benefit intended to enable persons who lack sufficient resources to meet their housing needs so as to ensure that they lead a decent existence constitutes a ‘core benefit’ within the meaning of Article 11(4) of Directive 2003/109.
- 41 In the present case, the referring court states that the purpose of housing assistance is to prevent housing costs from becoming an unreasonable burden. Housing assistance, which is capped at EUR 300, constitutes a subsidy to housing costs which is not designed to cover in full the housing costs of the recipient of the assistance, but to cover a portion of those costs so that persons on low incomes do not spend too large a proportion of their income on adequate housing.
- 42 It is apparent from the information provided by the referring court that, as the Advocate General noted in point 59 of his Opinion, housing assistance contributes to guaranteeing that those persons can lead a decent existence by enabling them to find adequate housing without spending too large a proportion of their income on housing to the detriment, possibly, of the satisfaction of other basic needs. Housing assistance thus appears to be a benefit that contributes to combating social exclusion and poverty, it being intended to ensure a decent existence for all those who lack sufficient resources, as referred to in Article 34(3) of the Charter. If that is the case, the grant thereof to third-country nationals who are long-term residents is therefore also necessary in order to achieve the integration objective pursued by Directive 2003/109. Consequently, housing assistance appears to be such as to constitute a ‘core benefit’ within the meaning of Article 11(4) of that directive.
- 43 It will, however, be for the referring court to ascertain whether that is the case and to reach the necessary findings, taking into consideration the purpose of the housing assistance, the conditions subject to which it is awarded and the place of that benefit in the national system of social assistance (see, to that effect, judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 92).
- 44 In that regard, the mere fact that third-country nationals who are long-term residents are eligible, if they fulfil the conditions for the grant thereof, for other social assistance such as the guaranteed minimum benefits provided for by the oöBMSG, which are intended to enable persons suffering social hardship to lead a decent existence, including as regards housing, and which may be regarded as a ‘core benefit’ within the meaning of Article 11(4) of Directive 2003/109, cannot preclude housing assistance from being regarded as such if it also meets the criteria referred to in paragraphs 38 to 40 of the present judgment.
- 45 Should housing assistance not be regarded as a ‘core benefit’ within the meaning of Article 11(4) of Directive 2003/109, it must be stated that Directive 2003/109 does not lay down any specific obligation in the event that, having made use of the option to apply the derogation provided for in Article 11(4) thereof, a Member State nevertheless grants a benefit which cannot be regarded as a ‘core benefit’ to third-country nationals who are long-term residents.
- 46 Such a situation is different from that in which an act of the European Union gives the Member States the freedom to choose between various methods of implementation or grants them a margin of discretion which is an integral part of the regime established by that act, and is also

different from the situation in which such an act authorises the adoption, by the Member States, of specific measures intended to contribute to the achievement of the objective of that act (see, to that effect, judgment of 19 November 2019, *TSN and AKT*, C-609/17 and C-610/17, EU:C:2019:981, paragraph 50).

- 47 Accordingly, if the view is taken that housing assistance does not constitute a ‘core benefit’ within the meaning of Article 11(4) of Directive 2003/109, the conditions for the grant of that benefit, such as proof of the possession of a basic command of German, which must be provided in a particular form, as laid down in Paragraph 6(9) and (11) of the oöWFG, come within the scope of the powers retained by the Member States, without being governed by that directive or coming within its scope (see, by analogy, judgment of 19 November 2019, *TSN and AKT*, C-609/17 and C-610/17, EU:C:2019:981, paragraph 52 and the case-law cited).
- 48 It follows that, in that situation, the conditions for the grant of housing assistance provided for in Paragraph 6(9) and (11) of the oöWFG do not have to be assessed in the light of Directive 2003/109.
- 49 In the light of all of the foregoing considerations, the answer to the first question referred is that Article 11(1)(d) of Directive 2003/109 must be interpreted as precluding, even where use has been made of the option to apply the derogation provided for in Article 11(4) of that directive, legislation of a Member State under which the grant of housing assistance to third-country nationals who are long-term residents is subject to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State, if that housing assistance constitutes a ‘core benefit’ within the meaning of that latter provision, this being a matter for the referring court to assess.

### *Second question referred*

- 50 By its second question, the referring court asks, in essence, whether Directive 2000/43 must be interpreted as precluding legislation of a Member State under which the grant of housing assistance to third-country nationals who are long-term residents is subject to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State.
- 51 In accordance with Article 1 and Article 2(1) and (2) of Directive 2000/43, that directive applies only to direct or indirect discrimination based on racial or ethnic origin. Article 3(2) of Directive 2000/43 provides that that directive does not cover differences in treatment based on nationality and is without prejudice to provisions and conditions relating to the entry into and residence of third-country nationals and stateless persons on the territory of Member States, and to any treatment which arises from the legal status of the third-country nationals and stateless persons concerned.
- 52 In the present case, the difference in the treatment of third-country nationals with long-term resident status vis-à-vis resident nationals, which results from Paragraph 6(9) and (11) of the oöWFG, is based on that status.
- 53 Such a difference in treatment does not therefore come within the scope of Directive 2000/43 (see, to that effect, judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraph 50).

- 54 The referring court is, however, unsure whether, under certain conditions, a difference in treatment based on a criterion of nationality or, as in the case in the main proceedings, on status as a third-country national who is a long-term resident may also constitute ‘indirect discrimination’ based on ethnic origin within the meaning of Article 2(2)(b) of Directive 2000/43, since Paragraph 6(9) and (11) of the oöWFG makes a distinction not only on the basis of the criterion of long-term resident status, but also on the basis of the criterion of the possession of a basic command of the national language.
- 55 In that regard, it should be borne in mind that, according to Article 2(2)(b) of Directive 2000/43, indirect discrimination is to be taken to occur where an apparently neutral provision, criterion or practice would put persons of a given racial or ethnic origin at a particular disadvantage in comparison with other persons. The words ‘particular disadvantage’ used in that provision must be understood as meaning that it is particularly persons of a given ethnic origin who are at a disadvantage because of the measure at issue. The concept of ‘indirect discrimination’ within the meaning of Article 2(2)(b) of Directive 2000/43 is applicable only if the allegedly discriminatory measure has the effect of placing a person of a particular ethnic origin at a disadvantage (judgments of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 100; of 6 April 2017, *Jyske Finans*, C-668/15, EU:C:2017:278, paragraphs 27 and 31; and of 15 November 2018, *Maniero*, C-457/17, EU:C:2018:912, paragraphs 47 and 48).
- 56 Paragraph 6(9) and (11) of the oöWFG, which is applicable to all third-country nationals without distinction, does not place persons of a particular ethnic origin at a disadvantage. Consequently, it cannot constitute ‘indirect discrimination’ based on ethnic origin within the meaning of Article 2(2)(b) of Directive 2000/43.
- 57 In the light of all of the foregoing considerations, the answer to the second question referred is that legislation of a Member State which is applicable to all third-country nationals without distinction and under which the grant of housing assistance to third-country nationals who are long-term residents is subject to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State does not come within the scope of Directive 2000/43.

### ***Third question referred***

- 58 By its third question, the referring court asks, in essence, whether Article 21 of the Charter, in so far as it prohibits any discrimination based on ethnic origin, must be interpreted as precluding legislation of a Member State under which the grant of housing assistance to third-country nationals who are long-term residents is subject to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State.
- 59 In that regard, it should be borne in mind that Article 51(1) of the Charter provides that the provisions thereof are addressed to the Member States only when they are implementing EU law. Article 6(1) TEU and Article 51(2) of the Charter specify that the provisions of the Charter are not to extend in any way the competences of the European Union as defined in the Treaties. Accordingly, the Court is called upon to interpret, in the light of the Charter, EU law within the limits of the powers conferred on it and therefore has no jurisdiction to examine the compatibility with the Charter of national legislation falling outside the scope of EU law (see, to

that effect, judgments of 6 March 2014, *Siragusa*, C-206/13, EU:C:2014:126, paragraphs 20 and 21, and of 10 July 2014, *Julián Hernández and Others*, C-198/13, EU:C:2014:2055, paragraph 32).

- 60 Firstly, as is apparent from the answer to the second question referred, legislation of a Member State such as that at issue in the main proceedings does not come within the scope of Directive 2000/43.
- 61 Secondly, should housing assistance not be regarded as a ‘core benefit’ within the meaning of Article 11(4) of Directive 2003/109, it should be borne in mind that the latter, as stated in paragraphs 45 and 47 of the present judgment, does not impose any specific obligation on Member States where, having made use of the option to apply the derogation provided for in Article 11(4) of Directive 2003/109, those Member States nevertheless grant third-country nationals who are long-term residents a non-core benefit relating to social assistance or social protection. Accordingly, the conditions for the grant of such a benefit, such as proof of a basic command of German, which must be provided in a particular form, as laid down in Paragraph 6(9) and (11) of the oöWFG, do not come within the scope of that directive.
- 62 It follows that, in that situation, a provision such as Paragraph 6(9) and (11) of the oöWFG falls outside the scope of the Charter and cannot therefore be assessed in the light of the provisions of the latter, in particular Article 21 thereof (see, to that effect, judgment of 19 November 2019, *TSN and AKT*, C-609/17 and C-610/17, EU:C:2019:981, paragraph 53 and the case-law cited).
- 63 By contrast, if housing assistance does constitute a ‘core benefit’ within the meaning of Article 11(4) of Directive 2003/109, it should be noted that, as is apparent from paragraph 39 of the present judgment, the Charter will be applicable. However, a provision such as Paragraph 6(9) and (11) of the oöWFG, which is applicable to all third-country nationals without distinction and from which it is not apparent that it places persons of a particular ethnic origin at a disadvantage, cannot be regarded as constituting discrimination based on ethnic origin within the meaning of Article 21 of the Charter, to which Directive 2000/43 gives specific expression in the substantive fields that it covers (see, to that effect, judgment of 16 July 2015, *CHEZ Razpredelenie Bulgaria*, C-83/14, EU:C:2015:480, paragraph 58).
- 64 In the light of all of the foregoing considerations, the answer to the third question referred is that, where use has been made of the option to apply the derogation provided for in Article 11(4) of Directive 2003/109, Article 21 of the Charter is not intended to apply to legislation of a Member State under which the grant of housing assistance to third-country nationals who are long-term residents is subject to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State, if that housing assistance does not constitute a ‘core benefit’ within the meaning of Article 11(4) of that directive. If the housing assistance in question does constitute such a core benefit, Article 21 of the Charter, in so far as it prohibits any discrimination based on ethnic origin, does not preclude such legislation.

## Costs

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



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

- 1. Article 11(1)(d) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents must be interpreted as precluding, even where use has been made of the option to apply the derogation provided for in Article 11(4) of that directive, legislation of a Member State under which the grant of housing assistance to third-country nationals who are long-term residents is subject to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State, if that housing assistance constitutes a ‘core benefit’ within the meaning of that latter provision, this being a matter for the referring court to assess.**
- 2. Legislation of a Member State which is applicable to all third-country nationals without distinction and under which the grant of housing assistance to third-country nationals who are long-term residents is subject to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State does not come within the scope of Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.**
- 3. Where use has been made of the option to apply the derogation provided for in Article 11(4) of Directive 2003/109, Article 21 of the Charter of Fundamental Rights of the European Union is not intended to apply to legislation of a Member State under which the grant of housing assistance to third-country nationals who are long-term residents is subject to the condition that they provide proof, in a form specified by that legislation, that they have a basic command of the language of that Member State, if that housing assistance does not constitute a ‘core benefit’ within the meaning of Article 11(4) of that directive. If the housing assistance in question does constitute such a core benefit, Article 21 of the Charter of Fundamental Rights, in so far as it prohibits any discrimination based on ethnic origin, does not preclude such legislation.**

[Signatures]