



Reports of Cases

OPINION OF ADVOCATE GENERAL
RICHARD DE LA TOUR
delivered on 13 February 2025¹

Case C-397/23

FL

v

Jobcenter Arbeitplus Bielefeld
other party:
Stadt Bielefeld

(Request for a preliminary ruling from the Sozialgericht Detmold (Social Court, Detmold, Germany))

(Reference for a preliminary ruling – Free movement of persons – Union citizen with a right of residence as a jobseeker – Article 18 TFEU – Principle of non-discrimination on grounds of nationality – Directive 2004/38/EC – Article 24 – Principle of equal treatment – Derogation in relation to social assistance – Scope – Granting of a national right of residence for the exercise of parental responsibility in respect of a minor child – Distinction depending on the child's nationality)

I. Introduction

1. The question referred by the Sozialgericht Detmold (Social Court, Detmold, Germany) for a preliminary ruling was raised in proceedings between FL and the Jobcenter Arbeitplus Bielefeld (Bielefeld Job Centre, Germany),² which had refused to award him the basic social welfare benefits provided for by German legislation. Given that that decision was justified with reference to the nature of the permit allowing him to reside legally in German territory, FL, when arguing that he should be granted those benefits, contested the fact that he cannot be granted a right of residence on the grounds that he is exercising parental responsibility in respect of his child, as provided for by the legislation in question, merely because the child is not German.

2. Unlike previous questions referred for a preliminary ruling in relation to social assistance benefits claimed by 'mobile' Union citizens,³ the novel question referred to the Court relates to unequal treatment in respect of the conditions under which a national right of residence is granted; it does not relate to the differing financial effects for persons with a national right of residence and nationals.

¹ Original language: French.

² 'Jobcenter Bielefeld'.

³ Union citizens who do not hold the nationality of the Member State in whose territory they are residing.

3. The Court is essentially asked to rule on the compatibility with EU law of rules concerning a national right of residence that does not apply to a ‘mobile’ Union citizen on the grounds that his or her child holds a nationality which is not that of the host country, whereas the conditions governing the granting of that right are within the jurisdiction of that Member State.

4. The circumstances of the main proceedings thus provide the Court with an opportunity to specify the scope of application of Article 24 of Directive 2004/38/EC,⁴ in relation to equal treatment, having regard to the Court’s recent case-law on the situation of ‘mobile’ Union citizens granted a right of residence in keeping with national rules in such a way that they no longer need to meet the conditions regarding financial means provided for by that directive.⁵

II. Legal context

A. European Union law

5. The first paragraph of Article 18 TFEU reads as follows:

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

6. Article 14 of Directive 2004/38, headed ‘Retention of the right of residence’, provides, in paragraphs 2 and 4 thereof:

‘2. Union citizens and their family members shall have the right of residence provided for in Articles 7, 12 and 13 as long as they meet the conditions set out therein.

...

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:

...

(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.’

7. According to Article 24 of that directive, headed ‘Equal treatment’:

‘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

⁴ Directive 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, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34).

⁵ See judgment of 15 July 2021, *The Department for Communities in Northern Ireland (C-709/20, ‘the judgment in CG’)*, EU:C:2021:602).

State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. ...

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) ... to persons other than workers, self-employed persons, persons who retain such status and members of their families.’

8. Article 37 of that directive, entitled ‘More favourable national provisions’, reads as follows:

‘The provisions of this Directive shall not affect any laws, regulations or administrative provisions laid down by a Member State which would be more favourable to the persons covered by this Directive.’

B. German law

1. Residence

9. Paragraph 28 of the Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, employment and integration of foreign nationals in the Federal Territory)⁶ of 30 July 2004⁷ (‘the AufenthG’), entitled ‘Family reunification to join a German national’, provides, in subparagraph 1 thereof:

‘A residence permit is to be granted to the foreign

1. spouse of a German national,
2. minor unmarried child of a German national,
3. parent of a minor unmarried German for the purpose of exercising parental authority,

if the German national is habitually resident in the federal territory. ...’

10. Paragraph 11(14) of the Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Law on the General Freedom of Movement for Union Citizens)⁸ of 30 July 2004⁹ (‘the FreizügG/EU’) reads as follows:

‘The Aufenth[G] shall also apply if it establishes a more favourable legal status than this Law. ...’

⁶ BGBl. 2004 I, p. 1950.

⁷ In the version introduced by the Law of 27 July 2015 (BGBl. 2015 I, p. 1386).

⁸ BGBl. 2004 I, p. 1986.

⁹ In the version introduced by the Law of 12 November 2020 (BGBl. 2020 I, p. 2416).

2. *Social assistance benefits*

11. Paragraph 7 of the Sozialgesetzbuch Zweites Buch, Grundsicherung für Arbeitsuchende (Volume II of the Social Code, Basic Security for Jobseekers¹⁰)¹¹ ('the SGB II'), headed 'Recipients of benefits', provides, in subparagraph 1 thereof:

'The benefits granted under this Volume 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. who are habitually resident in the Federal Republic of Germany (beneficiaries fit for work).

The following shall be 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 [FreizügG/EU], and their family members, for the first three months of their residence,
2. foreign nationals
 - (a) who do not have a right of residence,
 - (b) whose right of residence arises solely out of the search for employment ...

...

and their family members,

...

... By way of derogation from point 2 of the second sentence, foreign nationals and their family members shall receive benefits granted under this Volume if they have been habitually resident in the federal territory for at least five years ...'

3. *Social welfare*

12. Paragraph 23 of the Sozialgesetzbuch Zwölftes Buch, Sozialhilfe (Volume XII of the Social Code, Social Welfare)¹² ('SGB XII'), headed 'Social welfare for foreign nationals', reads as follows:

'(1) Subsistence assistance, assistance for sick persons, assistance for pregnant women, maternity assistance and care assistance under this Volume must be given to foreign nationals who are

¹⁰ The term 'Bürgergeld' ('Citizen's benefit') was added to the title of Volume II on 1 January 2023.

¹¹ In the version in force until 31 December 2020, introduced by the Law of 30 November 2019 (BGBl. 2019 I, p. 1948).

¹² In the version in force until 31 December 2020, introduced by the Law of 22 December 2016 (BGBl. 2016 I, p. 3155).

actually resident in national territory. The provisions of the Fourth Chapter shall not be affected. Otherwise, social welfare may be granted in so far as it is justified in a particular case. The restrictions under the first sentence shall not apply to foreign nationals holding a permanent residence permit or a residence permit of limited duration who anticipate taking up permanent residence in the federal territory. Legal provisions under which social welfare other than the benefits referred to in the first sentence must or should be granted shall not be affected.

...

(3) Foreign nationals and their family members shall not receive benefits under subparagraph 1 or under the Fourth Chapter if

1. they 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 [FreizügG/EU] for the first three months of their residence,
2. they do not have a right of residence or their right of residence arises solely out of the search for employment,

...

4. they entered the territory in order to obtain social welfare.

...

... By way of derogation from points 2 and 3 of the first sentence, foreign nationals and their family members shall receive benefits under the first and second sentences of subparagraph 1 if they have resided in the federal territory for at least five years without significant interruption ...'

III. The facts in the main proceedings and the question referred for a preliminary ruling

13. The applicant in the main proceedings, FL, a Polish national, entered Germany from the Netherlands on 30 May 2020, accompanied by his 'non-marital partner',¹³ also of Polish nationality. The latter had briefly resided in the Netherlands, but had been resident in Germany since 30 August 2015, which was the date when she entered the country from Poland.

14. Their common child was born on 27 November 2020 in Germany and is also of Polish nationality.

15. FL, his partner and their joint child applied to the Jobcenter Bielefeld for basic social welfare benefits under the SGB II. In decisions dated 3 and 21 December 2020, the latter awarded benefits to FL's partner, backdating the award to 30 May 2020, and also to the child, backdating the award to his date of birth. By way of contrast, in a decision dated 21 April 2021, FL's application was rejected for the period between 30 May 2020 and 28 February 2021 on the grounds that he only had a right of residence for the sole purpose of seeking employment, and was not otherwise entitled to a right of residence entitling him to benefits under the SGB II.

¹³ The 'partner'. This term is used in the request for a preliminary ruling without any link to the terms used in Directive 2004/38. Its meaning is thus equivalent to 'girlfriend' or 'cohabiting partner'.

16. In a decision dated 19 July 2021, the Jobcenter Bielefeld rejected FL's complaint as unfounded, setting out essentially the same grounds. In particular, the Jobcenter Bielefeld found that FL was not entitled to a right of residence:

- as provided for by national law, as a family member or related person of his partner who had a permanent right of residence,
- on the grounds that he was exercising parental responsibility for his minor son,¹⁴ since the latter was not of German nationality,
- further to the judgment of 6 October 2020, *Jobcenter Krefeld*,¹⁵ and Regulation (EU) No 492/2011,¹⁶ because FL's child was not of compulsory school age.

17. According to the Jobcenter Bielefeld, in the light of Article 4 of Regulation (EC) No 883/2004,¹⁷ Paragraph 28 of the *AufenthG* should furthermore not be interpreted as meaning that EU law requires the single father of a Union citizen not yet of compulsory school age to be entitled to a right of residence.

18. Furthermore, the mere fact that the single father did not receive any basic social welfare benefits under the *SGB II* did not deprive his partner of exercising her rights to freedom of movement and residence effectively.

19. On 12 August 2021, FL brought an action against that decision before the referring court. In essence, he believes that a right of residence results from the combined provisions of point 3 of the first sentence of Paragraph 28(1) of the *AufenthG*, Article 6 of the *Grundgesetz für die Bundesrepublik Deutschland* (Basic Law of the Federal Republic of Germany)¹⁸ and Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms.¹⁹ He asserts that restricting the right to family reunification for the purpose of exercising parental responsibility to cases where the child is a 'German national' is contrary to EU law and constitutes undue discrimination as well as a restriction on freedom of movement.²⁰

20. The Jobcenter Bielefeld and the *Amt für soziale Leistungen (Sozialamt) der Stadt Bielefeld* (Social Welfare Office of the City of Bielefeld, Germany), as a party to the proceedings, asserted in response that a right of residence could not be derived from point 3 of the first sentence of Paragraph 28(1) of the *AufenthG*, which – based on its very heading – applied solely to 'German

¹⁴ Pursuant to point 3 of the first sentence of Paragraph 28(1) of the *AufenthG*, read on its own or in conjunction with the first sentence of Paragraph 11(14) of the *FreizügG/EU*.

¹⁵ C-181/19, EU:C:2020:794.

¹⁶ Regulation of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1).

¹⁷ Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1). That article, headed 'Equality of treatment', reads as follows: '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.'

¹⁸ 'The Basic Law'. That article aims in particular to guarantee special protection for marriage and the family, and sets out the obligations of parents with regard to the care and upbringing of their children. It furthermore enshrines the principle of equal treatment for children born outside and inside marriage.

¹⁹ Signed in Rome on 4 November 1950.

²⁰ The referring court noted, with reference to the substantiating evidence cited by FL, that his application for basic social welfare benefits could not cover a period commencing on 30 May 2020, which was the date of his entry into Germany with a view to seeking employment in the country. Since the application was based on the exercise of parental responsibility in respect of his son, it had to commence on that child's date of birth, or, in other words, on 27 November 2020. It follows that the period of entitlement for the basic social welfare benefits applied for was three months.

nationals’, and not to ‘Union citizens’. According to those parties, an inherent characteristic of national immigration and residence law is that a distinction is to be drawn between ‘German nationals’ and ‘foreign nationals’. They stated that the rules in question are not contrary to EU law.

21. According to the referring court, the case-law of higher courts is not uniform on the question of whether a refusal to grant a residence permit to a Union citizen exercising parental responsibility in respect of a minor child residing in federal territory who is entitled to the right of freedom of movement and who holds the nationality of another Member State constitutes discrimination.

22. The referring court also explains that, in a ruling handed down on 4 October 2019,²¹ the Bundesverfassungsgericht (Federal Constitutional Court, Germany) noted that, in past decisions by the higher social courts and in the academic literature, opinions differed as to whether the eleventh sentence of Paragraph 11(1) of the FreizügG/EU, in the version applicable until 23 November 2020,²² in conjunction with point 3 of the first sentence of Paragraph 28(1) of the AufenthG and the first paragraph of Article 18 TFEU, could confer a right of residence on a parent who exercises parental responsibility in respect of a minor who is a Union citizen and who has the right to move freely pursuant to the first sentence of Paragraph 3(1) of the FreizügG/EU because he or she is accompanying the other parent.

23. Given the lack of any decision by the supreme court on this matter, the referring court held that it was necessary to refer the question to the Court of Justice so that the latter could rule on the compatibility of the German rules with EU law, in particular Article 18, Article 20 and Article 21(2) TFEU, and Article 33(1) of the Charter of Fundamental Rights of the European Union,²³ Regulation (EC) No 987/2009²⁴ and Directive 2004/38.

24. Under those circumstances, the Sozialgericht Detmold (Social Court, Detmold) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is EU law to be interpreted as precluding a national rule under which a residence permit for the purpose of care and custody may be granted only to the foreign parent of an unmarried minor child resident in national territory if the child has his or her habitual residence in national territory, which means that Union citizens of a Member State do not have such entitlement to the grant of a residence permit for the purpose of care and custody of a Union citizen who is a minor and a national of a Member State other than the host country?’

25. Written comments were filed by the European Commission, which, like the German Government, attended the hearing held on 14 November 2024, during which they also answered the questions for oral answer put by the Court.

²¹ The referring court has stated that this decision can be consulted via the following link: https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/2019/10/rk20191004_1bvr171018.html, paragraph 12.

²² First sentence of Paragraph 11(14), *since 24 November 2020*.

²³ ‘The Charter’.

²⁴ Regulation of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2009 L 284, p. 1).

IV. Analysis

26. By its question for a preliminary ruling, the referring court raises the question of the compatibility with EU law, and, in particular, having regard to the grounds for its request, with Article 18 TFEU and Article 33(1) of the Charter as well as Directive 2004/38, of the national rules of a Member State according to which a residence permit for the purpose of exercising parental responsibility cannot be granted to a ‘mobile’ Union citizen who is the parent of a minor unmarried child who is not a national of the host Member State in which that child is habitually resident.

27. Those national rules, which allow a Member State to adopt provisions concerning the right of residence that are more favourable than those provided for by EU law,²⁵ fall within the scope of Article 37 of Directive 2004/38.

28. They promote family reunification for the purpose of allowing a foreign parent to exercise parental responsibility for his or her German child.²⁶ Given the lack of any qualifications concerning children who are also Union citizens, those rules create a discriminatory effect on the ground of nationality, which is prohibited under EU law. This general principle of equality is one of the fundamental principles of EU law.²⁷

29. According to the settled case-law cited in paragraphs 62, 63 and 65 of the judgment in *CG*:²⁸

- Article 20(1) TFEU confers on any person holding the nationality of a Member State the status of citizen of the Union and that status 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;
- every 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. Those situations include those relating to the exercise of the freedom 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;²⁹ and
- the first paragraph of Article 18 TFEU is intended to apply independently only to situations governed by EU law with respect to which the FEU Treaty does not lay down specific rules on non-discrimination. Moreover, the second subparagraph of Article 20(2) TFEU, as well as Article 21 TFEU, in similar terms, make the right of Union citizens to move and reside freely

²⁵ For a case involving a parent who is a third-country national, see *Stadt Wuppertal* (C-130/24), currently pending. For other examples, see also, judgment of 21 December 2011, *Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866, paragraph 50), and the judgment in *CG* (paragraph 82).

²⁶ During the hearing, the German Government stated that a German child could reunify his or her family under Paragraph 28 of the AufenthaltG, on the basis of Article 11 of the Basic Law, which relates to the right of residence of German nationals in Germany. See also point 63 of this Opinion.

²⁷ See judgments of 19 November 2024, *Commission v Czech Republic (Ability to stand for election and membership of a political party)* (C-808/21, EU:C:2024:962, paragraph 97), and of 19 November 2024, *Commission v Poland (Ability to stand for election and membership of a political party)* (C-814/21, EU:C:2024:963, paragraph 96).

²⁸ See also, with regard to paragraph 65 of that judgment, judgments of 19 November 2024, *Commission v Czech Republic (Ability to stand for election and membership of a political party)* (C-808/21, EU:C:2024:962, paragraph 98), and of 19 November 2024, *Commission v Poland (Ability to stand for election and membership of a political party)* (C-814/21, EU:C:2024:963, paragraph 97).

²⁹ See also, the judgment in *CG* (paragraph 58).

within the territory of the Member States subject to compliance with the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect.

30. Similarly, the Court found, in paragraph 66 of the judgment in *CG*, that ‘the principle of non-discrimination is given 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’.

31. In that regard, the Court noted, in paragraph 67 of that judgment, in essence, that ‘mobile’ Union citizens³⁰ fall within the scope of application of Directive 2004/38 and are beneficiaries of the rights conferred by it, and held that it is in the light of Article 24 of that directive, and not of the first paragraph of Article 18 TFEU, that it is necessary to assess whether such persons face discrimination on the ground of nationality.

32. In relation to that section of the statement of reasons for the judgment in *CG*, I would note the irrelevance of the fact that the right of residence was provided for by national rules that were more favourable than the provisions of Directive 2004/38, since, in the case in question, the relevant individual was the beneficiary of a national right of residence, and I would note that Article 24(1) of that directive restricts the expression of the principle of equal treatment to Union citizens who are residing in the territory of the host Member State *on the basis of that directive*.³¹

33. Therefore, *prima facie*, since FL is residing legally in German territory as a jobseeker in the case at hand,³² it would be consistent, as stressed by the Commission, to rely on Article 24(1) of Directive 2004/38 as a basis for providing the referring court with a response stating that the national rules, which apply different treatment to nationals, come up against the principle of equal treatment which is set out therein, essentially on the grounds that those rules affect the effective exercise of the right to move and reside freely within the territory of the Member States.

34. As far as FL’s child is concerned, it should furthermore be noted that the fact that he was born in German territory and has not made use of the right to freedom of movement is irrelevant in terms of the exercise of his rights to move and reside freely as a Union citizen.³³

35. I find the argument that Article 24(1) of Directive 2004/38 should apply to the present case unconvincing, however. After having explained my reservations, I shall therefore set out the grounds which I believe should be used as a basis.

A. The application of Article 24(1) of Directive 2004/38

36. The decision to rely on this Article, which implies a *comparison with nationals*, is based on two different approaches to the discrimination on the grounds of the child’s nationality which is at issue, depending on whether this discrimination is viewed from the perspective of the child or the foreign parent, as explained by the Commission.

³⁰ It is stated in that paragraph that, ‘in accordance with Article 3(1) of Directive 2004/38, Union citizens who move to or reside in a Member State other than that of which they are a national, and their family members, as defined in Article 2(2) of that directive, who accompany or join them, fall within the scope of the directive and are beneficiaries of the rights conferred by it (judgment of 10 September 2019, *Chenchooliah*, C-94/18, EU:C:2019:693, paragraph 54 and the case-law cited)’.

³¹ See the judgment in *CG* (paragraph 83).

³² See point 15 of this Opinion.

³³ See, to that effect, judgment of 13 September 2016, *Rendón Marin* (C-165/14, EU:C:2016:675, paragraph 42).

37. The national rules under examination mean that a non-German child is subject to direct discrimination when compared to a German child who can benefit from the presence of a foreign parent permitted to remain in German territory for the purpose of exercising parental responsibility.

38. As regards the foreign parent of a non-German child, it must be considered that he or she is subject to direct discrimination³⁴ on the grounds of his or her child's nationality, which prevents him or her from exercising parental authority in respect of his or her child under the same conditions as a German parent. Since this discrimination is *linked* to the child's nationality, it could be regarded as discrimination 'by association' (*'par association'*³⁵ or *'par ricochet'*,³⁶ whereby these two expressions are used equivalently). Discrimination by association refers to a situation in which the person who has suffered direct discrimination based on a particular criterion (which may be a disadvantage or may not, such as 'being a German child' (nationality) in the case at hand) does not fulfil that criterion, but the latter is nevertheless the basis for the allegedly less favourable treatment. In such cases, the right of the person affected by the discriminating criterion has been infringed, rather than the right of the person concerned.

39. That being said, regardless of whether the matter is viewed from the perspective of the child or the parent, a significant difficulty arises in respect of the matter in dispute, or, in other words, the granting of a national right of residence.³⁷

40. The first sentence of Article 24(1) of Directive 2004/38 reads as follows: '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.'

41. In the case at hand, it is certainly true that both the child and the parent are resident in Germany under Directive 2004/38. What is more, even if the question by the referring court pertains to the conditions under which a national right of residence is granted, the underlying aim is to recognise an entitlement to basic social welfare benefits under the same conditions as those that apply to nationals.

42. In my view, this point needs to be made extremely clear. The equality of treatment under discussion in the main proceedings relates solely to the conditions for granting a residence permit, and not to access to basic social welfare benefits. Once such a permit has been granted, the benefits are awarded without making any distinction between beneficiaries.³⁸

43. The principle of equality of treatment with nationals, as enshrined in Article 24(1) of Directive 2004/38, cannot therefore result in the granting of a right of residence, whether for the direct benefit of the father or the indirect benefit of the child.

³⁴ In the case at hand, the characteristic is nationality rather than a neutral characteristic that may create such discrimination on the grounds of nationality.

³⁵ See, by way of analogy, this expression in the Opinion of Advocate General Poiares Maduro in *Coleman* (C-303/06, EU:C:2008:61, points 4, 5 and 20, as well as footnote 5).

³⁶ See Opinion of Advocate General Kokott in *CHEZ Razpredelenie Bulgaria* (C-83/14, EU:C:2015:170, point 55).

³⁷ See point 19 of this Opinion.

³⁸ As regards the consequences in terms of basic social welfare benefits, it follows from the wording of Paragraph 7(1) of the SGB II and Paragraph 23 of the SGB XII that it is irrelevant whether the applicant is a national, or whether his or her right of residence is provided for under Directive 2004/38 or the national rules in question. In this latter case, the German rules governing social welfare benefits are favourable to Union citizens, since the Court found, in the judgment in *CG*, that persons who do not have a *right of residence under Directive 2004/38* cannot rely on the principle of non-discrimination laid down in Article 24(1) of that directive (see, to that effect, paragraphs 80 and 83 of that judgment).

44. In the Court's case-law to date, Article 24 has been interpreted in cases involving an application for social assistance benefits in which an inequality of treatment in comparison to the rights granted to nationals in the same economic situation has been relied upon.³⁹ The Court has ruled on the conditions under which the principle of equality of treatment with nationals applies in respect of the *consequences of a right of residence*.⁴⁰ The latter must be granted under Directive 2004/38⁴¹ and, as far as the consequences are concerned, express provision is made only for exceptions specific to certain categories of persons in relation to social assistance benefits.⁴²

45. In the case at hand, FL's application relates to an earlier stage, namely *entitlement to a right of residence*.

46. I am therefore of the view, contrary to the Commission's opinion, which relies on Article 24(2) of Directive 2004/38 on the grounds that the latter makes no provision for a derogation from the principle of equal treatment in relation to the right of residence, that that principle cannot be used as the basis for conferring entitlement to such a right. To put it another way, the granting of a residence permit as provided for by the national rules in question cannot be a consequence of that principle, which applies to Union citizens on the grounds of their right of residence granted under that directive.

47. A different argument can be put forward on the basis of the wording of that provision, which expressly provides for a comparison with nationals. The latter cannot claim any right of residence for themselves, since they already hold such a right unconditionally.⁴³ The principle of equal treatment enshrined in Directive 2004/38 does not therefore apply to the right of residence, regardless of whether that right is governed by more favourable national provisions.

48. Is it the case, however, as suggested by the Commission, that as soon as a comparison with nationals must be made 'within the scope of application of the Treaty', a teleological interpretation of Article 24 of Directive 2004/38 might be preferred?⁴⁴ In other words, even if equal treatment with nationals of the host Member State is not directly at stake as regards the right of residence, this might be the case for other areas covered by the scope of application of the Treaty, relying solely on the purpose of the rules in question. To that effect, the Commission asserts, on the basis of Article 24(1) of Directive 2004/38 and from the perspective of the child, that the national rules in question undermine the effectiveness of the right to reside in German territory granted to a child under that directive⁴⁵ in so far as he or she cannot benefit from a

³⁹ See, in particular, the judgment in *CG* (paragraph 77 and the case-law cited).

⁴⁰ See, in that regard, the judgment in *CG* (paragraph 83 and the case-law cited regarding the freedom of Member States to specify the consequences of a right of residence granted on the basis of national law alone).

⁴¹ It follows from the judgment in *CG* that the principle of non-discrimination laid down in Article 24(1) of Directive 2004/38 cannot be relied upon, in order to obtain the social assistance benefits paid to nationals in the same situation, by a Union citizen likely to become an unreasonable burden on the social assistance system of the host Member State (paragraph 80) or to whom a right of residence has been granted on the grounds of national rules more favourable than the provisions of Directive 2004/38 (paragraph 83), without conditions as to resources (paragraph 81).

⁴² See Article 24(2) of Directive 2004/38.

⁴³ See, to that effect, judgments of 14 November 2017, *Lounes* (C-165/16, EU:C:2017:862, paragraph 37), and of 22 June 2023, *Staatssecretaris van Justitie en Veiligheid (Thai mother of a Dutch minor child)* (C-459/20, EU:C:2023:499, paragraph 41). See also the Commission notice 'Guidance on the right of free movement of EU citizens and their families' (OJ C C/2023/1392), in particular p. 6.

⁴⁴ See, by way of comparison and in relation to the topic of social assistance benefits, Lenaerts, K. and Gutiérrez-Fons, J., *Les méthodes d'interprétation de la Cour de justice de l'Union européenne*, Bruylant, Bruxelles, 2020, in particular paragraph 71 (pp. 69 to 71), as well as Lenaerts, K., 'The broadening of EU competences through the case-law of the Court of Justice: Myth or reality?', *ERA Forum, Journal of the Academy of European Law*, Vol. 24, No 4, ERA, Trier, 2023, pp. 589 to 598, in particular pp. 595 and 596.

⁴⁵ I would note that, in the case at hand, FL's child has a right of residence derived from that of his mother. The Court has held 'that Article 20 TFEU precludes national measures, including decisions refusing a right of residence to the family members of a Union citizen, which have the effect of depriving Union citizens of the genuine enjoyment of the substance of the rights conferred by virtue of their status' (see judgment of 10 May 2017, *Chavez-Vilchez and Others*, C-133/15, EU:C:2017:354, paragraph 61 and the case-law cited).

family life in the same way as a German child. The Commission argues, first, that EU law, and in particular Articles 7 and 24 of the Charter, do not only protect family life and the child's right to well-being, and, secondly, that the effectiveness of a young child's right of residence implies that that child should have the right to be accompanied and cared for by the individual responsible for his or her safekeeping.⁴⁶

49. Understood within the framework of Article 24(1) of Directive 2004/38, those arguments therefore presuppose that the rules in question, which facilitate the exercise of parental responsibility by foreign parents for German children, should be regarded as allowing those parents, in comparison with nationals *who exercise the same parental rights*, to enjoy in full the rights associated with the exercise of the freedom of movement and residence, which includes the right to lead a family life with all the associated rights, for parents in their relations with their children.⁴⁷

50. A further point that can be made is that the national rules in question, which were enacted in favour of foreign parents since they provide for both a right of residence aimed at family reunification and an entitlement to basic social welfare benefits for that purpose, help to guarantee freedom of movement and a family life under normal and dignified living conditions.⁴⁸

51. These rights, which must be protected irrespective of nationality, would thus justify the application of Article 24(1) of Directive 2004/38 as a basis for assessing the compatibility with EU law of the national rules in question, thereby triggering a *right of residence in the national territory*.

52. These rights are in fact of paramount importance. Viewed through that lens, however, the principle of non-discrimination on the grounds of nationality as enshrined in Article 24 of Directive 2004/38, with the exceptions provided for in Article 24(2), would have an extremely broad scope that would run the risk of undermining the scheme of that directive.

53. In that respect, FL's situation serves as a concrete demonstration of the importance of avoiding an overly broad interpretation of the scope of Article 24(1) of Directive 2004/38. I would note that FL has a right of residence in German territory under that directive for the purpose of seeking employment, and may accordingly, on that basis, rely on the application of Article 24(1) of that directive for consequences other than those provided for in relation to basic social welfare benefits, since he cannot benefit from them under Article 24(2) of that directive.

⁴⁶ See also FL's arguments, which are summarised, in essence, in point 19 of this Opinion.

⁴⁷ See, in particular, the judgment in *CG* (paragraph 90), and the judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'* (C-490/20, EU:C:2021:1008, paragraph 47 and the case-law cited, and paragraphs 59 and 65). In the case at hand, FL could argue that he is dissuaded, solely on economic grounds, from remaining in Germany in order to exercise his parental responsibility there, since he is authorised to reside in Germany to seek employment in the country without any entitlement to basic social welfare benefits. Similarly, it could be asserted that, depending on their nationality and regardless of whether one of their parents is a Union citizen, the children in question, who are Union citizens, will be able or unable to live in German territory with that parent, residing there legally with an entitlement to the basic social welfare benefits paid to the latter.

⁴⁸ See, to that effect, the judgment in *CG* (paragraphs 89 and 91).

54. Furthermore, having regard to the procedural clarifications supplied by the referring court,⁴⁹ it is common ground that FL cannot be granted a right of residence on any other basis under Directive 2004/38, in particular on the grounds of family relations,⁵⁰ and therefore claim entitlement to the associated basic social welfare benefits.

55. As a result, I believe that a finding that FL is entitled, on the basis of Article 24(1) of Directive 2004/38, to a right of residence allowing him to lead a family life under the same conditions as those provided for nationals would undermine the limits imposed by that directive in relation to family and economic matters,⁵¹ and thus the overall balance sought by the EU legislature.

56. What is more, this would justify a decision to exclude from the principle of non-discrimination enshrined in Article 24(1) of Directive 2004/38 national rules that allow a residence permit to be granted to a Union citizen whose situation falls within the scope of application of that directive.

57. In those circumstances, it must be stated that the principle outlined in the judgment in *CG*, according to which it is in the light of Article 24 of Directive 2004/38, and not of the first paragraph of Article 18 TFEU, that it is necessary to assess whether ‘mobile’ Union citizens face discrimination on the grounds of nationality,⁵² must be limited to situations in which the consequences of a right of residence granted under that directive are examined in comparison to nationals, which excludes more favourable national measures that relate to a right of residence.

58. Given that an interpretation of Article 24(1) of Directive 2004/38 is not possible, it is necessary to specify the conditions under which Article 18 TFEU thus applies.

B. The application of Article 18 TFEU

59. The choice of this basis for the right to equal treatment in relation to *entitlement to a residence permit* follows from the finding that the rules in question, from the parent’s perspective, create discrimination *between ‘mobile’ Union citizens* depending on the nationality of the child for whom he or she exercises parental responsibility. The Court has already found that the first paragraph of Article 18 TFEU concerns situations coming within the scope of EU law in which a national of one Member State suffers discriminatory treatment in relation to *nationals of another Member State* solely on the basis of his or her nationality.⁵³

60. From the child’s perspective, reference can be made to equal treatment with a German child on the grounds that the granting of a residence permit to his or her parent provided for under the national rules guarantees the effectiveness of his or her right to freedom of movement and

⁴⁹ See points 16 to 19 of this Opinion.

⁵⁰ It can be deduced from the grounds on which FL’s application was rejected that, during the period referred to in his application, he was living in Germany, but was not in a stable relationship with the mother of his child and was not actually caring for him. In this respect, if questions remain as to whether FL is not entitled on any basis to a right of residence under Directive 2004/38, it is for the referring court to address these questions (see judgments of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597, paragraph 52, and of 6 October 2020, *Jobcenter Krefeld*, C-181/19, EU:C:2020:794, paragraph 69). There is accordingly no need to extend the analysis of FL’s situation, as suggested by the Commission in its written observations, to Article 3 of Directive 2004/38, paragraph 2 of which was interpreted by the Court in its judgment of 5 September 2012, *Rahman and Others* (C-83/11, EU:C:2012:519).

⁵¹ See in particular, with regard to the reference to the conditions laid down by Directive 2004/38 in a situation comparable to that of FL’s child, the judgment of 13 September 2016, *Rendón Marín* (C-165/14, EU:C:2016:675, paragraphs 44 to 47). See also, with regard to those criteria for interpretation, by way of analogy, the judgment in *CG* (paragraph 81).

⁵² See point 31 of this Opinion.

⁵³ See judgment of 2 September 2021, *État belge (Right of residence in the event of domestic violence)* (C-930/19, EU:C:2021:657, paragraph 51 and the case-law cited).

residence in German territory, as conferred by point (a) of the first subparagraph of Article 20(2) and Article 21 TFEU. That claim can be based on Article 18 TFEU, since it is not a consequence of a right of residence granted under Directive 2004/38, within the meaning of Article 24 thereof.⁵⁴

61. An analysis of this kind in relation to the situation of both FL and his child,⁵⁵ even if they are resident in Germany under Directive 2004/38, offers the advantage of being in line with the part of the statement of reasons for the judgment in *CG*, in which the Court stated that Member States do not implement Directive 2004/38 when they provide for a right of residence according to more favourable rules than those established by that directive.⁵⁶

62. Such an analysis therefore lies within the framework of the Court's case-law on the special provisions that give expression to the principle set out in Article 18 TFEU and the rights derived from Articles 20 and 21 TFEU.

63. In that respect, during the hearing, the German Government asserted that the legislature's aim was to give concrete expression to a right pursuant to Article 11 of the Basic Law, which maintains the unity of the family in national German territory. In the same vein, the Commission clarified that a right that originally, back in 1990, was reserved solely for German nationals as a fundamental right enshrined by Germany, has now become a fundamental right enshrined by the EU. According to the Commission, the entitlement to a right of residence granted to the parent of a German child eligible for protection must now apply to all children legally resident in Germany, provided that they are Union citizens. A consensus has therefore emerged regarding the finding that the basis for the national rules in question is equivalent to that of Articles 20 and 21 TFEU.

64. The *conditions for granting a residence permit* which give rise to discrimination between 'mobile' Union citizens therefore fall within the scope of Article 18 TFEU, in the absence of specific provisions providing for adjustments to the principle of non-discrimination on the grounds of nationality in such cases. It is irrelevant that the matter relates to a 'mobile' Union citizen whose situation is governed by Directive 2004/38.

65. In the case at hand, the national rules are in contradiction with this fundamental principle by treating parents of German children more favourably in relation to residence permits.

66. Furthermore, even if the determination of conditions in this area that are more favourable than those provided for by EU law falls within the scope of the exercise of powers by the Member States, those states are obliged to comply with the obligations imposed on them by EU law.

C. The reference to the limitation on the exercise of powers by the Member States

67. Reference should be made to the Court's decision in the judgment in *CG* with regard to application of the Charter; in that judgment, it found that, when a Member State has provided for national rules on residence which apply conditions that are more favourable than those of Directive 2004/38, it has implemented the provisions of the FEU Treaty in relation to the status

⁵⁴ See point 57 of this Opinion.

⁵⁵ His case is governed solely by point (a) of the first subparagraph of Article 20(2) TFEU. See point 34 of this Opinion.

⁵⁶ See the judgment in *CG* (paragraphs 82, 83 and 87).

of a Union citizen who has exercised his or her freedom of movement within the territory of the Member States, as conferred by Article 21(1) TFEU. As a result, in accordance with Article 51(1) of the Charter, the Member State is obliged to comply with the provisions thereof.⁵⁷

68. As I have already noted,⁵⁸ in the situation with which the main proceedings are concerned, the right to respect for private and family life guaranteed in Article 7 of the Charter and the rights of the child guaranteed in Article 24 thereof, in particular a child's right to have his or her best interests taken into account as a primary consideration in all actions relating to children, and a child's right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, are fundamental.⁵⁹

69. In my view, when answering the question put by the referring court, it is sufficient to make a finding of discrimination on the grounds of nationality, and there is no need to specify any other fundamental rights, based on the Charter, which must be observed by the Member State in question when exercising its powers in situations falling within the scope of EU law. In that respect, it is irrelevant whether or not the direct discrimination is by association,⁶⁰ since, in any event, the justification for the national rules is ineffective in the light of the principles relied upon, which are also enshrined and protected in EU law.⁶¹

70. As a result, I propose that the Court should limit its answer to the interpretation of Article 18 TFEU, in conjunction with point (a) of the first subparagraph of Article 20(2) and Article 21(1) TFEU.

V. Conclusion

71. In the light of all the foregoing considerations, I propose that the Court answer the question referred by the Sozialgericht Detmold (Social Court, Detmold, Germany) as follows:

Article 18 TFEU, in conjunction with point (a) of the first subparagraph of Article 20(2) and Article 21(1) TFEU,

must be interpreted as precluding national rules of a host Member State under which a residence permit for the purpose of exercising parental responsibility may be granted only to 'mobile' Union citizens who are parents of a minor unmarried child who is a national of the host Member State in which he or she is habitually resident, and refused if the child is a national of another Member State.

⁵⁷ See the judgment in *CG* (paragraphs 84, 85, 86 and 88). See also Lenaerts, K., 'The Broadening of EU competences through the case-law of the Court of Justice: Myth or reality?', op. cit., in particular footnote 40 (p. 596), according to which – in relation to the judgments of 11 November 2014, *Dano* (C-333/13, EU:C:2014:2358), and of 15 September 2015, *Alimanovic* (C-67/14, EU:C:2015:597) – a key nuance entered the discussion in 2021 with the judgment in *CG*. The point is emphasised that the Court essentially found in that judgment that a Member State 'implements' a Union citizen's rights under Article 21(1) TFEU to freedom of movement when it grants a right of residence to that citizen, even if that right does not meet the conditions outlined in Directive 2004/38. This triggers the application of certain rights under the Charter and therefore requires that the host Member State grant the 'mobile' Union citizen the means of subsistence required to lead a life in keeping with human dignity.

⁵⁸ See points 48 to 52 of this Opinion.

⁵⁹ See, to that effect, judgment of 14 December 2021, *Stolichna obshtina, rayon 'Pancharevo'* (C-490/20, EU:C:2021:1008, paragraph 59). In particular, Article 24(3) of the Charter could be cited in relation to the child in the main proceedings.

⁶⁰ See point 38 of this Opinion.

⁶¹ See point 63 of this Opinion.