

Case C-181/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

25 February 2019

Referring court:

Landessozialgericht Nordrhein-Westfalen (Higher Social Court, North Rhine-Westphalia, Germany)

Date of the decision to refer:

14 February 2019

Applicant and Respondent:

JD

Defendant and Appellant:

Jobcenter Krefeld — Widerspruchsstelle

Subject matter of the main proceedings

The entitlement of persons having a right of residence in Germany pursuant to Article 10 of Regulation No 492/2011 to basic social security benefits in accordance with the Sozialgesetzbuch Zweites Buch — Grundsicherung für Arbeitsuchende (Second Book of the Social Code — Basic Social Security for Job Seekers; ‘SGB II’).

Subject matter and legal basis of the reference

Interpretation of the principle of equal treatment under Article 18 of the Treaty on the Functioning of the European Union (‘TFEU’) in conjunction with Articles 7, 10 and 4 of Regulation No 492/2011;

Interpretation of the concept of social advantage within the meaning of Article 7(2) of Regulation No 492/2011;

Interpretation of the scope of Article 24(2) of Directive 2004/38;

Legal basis: Article 267 TFEU.

Questions referred

1. Is the exclusion of Union citizens having a right of residence under Article 10 of Regulation No 492/2011 from receipt of social assistance within the meaning of Article 24(2) of Directive 2004/38 compatible with the requirement of equal treatment arising from Article 18 TFEU in conjunction with Articles 10 and 7 of Regulation No 492/2011?

(a) Does social assistance within the meaning of Article 24(2) of Directive 2004/38 constitute a social advantage within the meaning of Article 7(2) of Regulation No 492/2011?

(b) Does the limitation set out in Article 24(2) of Directive 2004/38 apply to the requirement of equal treatment arising from Article 18 TFEU in conjunction with Articles 10 and 7 of Regulation No 492/2011?

2. Is the exclusion of Union citizens from receipt of special non-contributory cash benefits within the meaning of Articles 3(3) and 70(2) of Regulation No 883/2004 compatible with the requirement of equal treatment arising from Article 18 TFEU in conjunction with Article 4 of Regulation No 883/2004 if those citizens have a right of residence arising from Article 10 of Regulation No 492/2011 and are integrated into a social security system or family benefits system within the meaning of Article 3(1) of Regulation No 883/2004?

Provisions of EU law cited

Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union (OJ 2011 L 141, p. 1) in the version of Regulation (EU) 2016/589 of the European Parliament and of the Council of 13 April 2016 (OJ 2016 L 107, p. 1), Articles 7 and 10;

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1), Article 4;

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), Article 4.

Provisions of national law cited

Sozialgesetzbuch Zweites Buch — Grundsicherung für Arbeitsuchende (Second Book of the Social Code — Basic Social Security for Job Seekers; ‘SGB II’), Paragraphs 7 and 9;

Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Law on the general freedom of movement of Union citizens; ‘FreizügG/EU’), Paragraphs 2 and 3.

Brief summary of the facts and procedure

- 1 The applicant is seeking (supplementary) basic social security benefits under the SGB II for himself and his two daughters, born in 2005 and 2010, for the period from 8 June to 31 December 2017 (‘the period at issue’).
- 2 The applicant, who was born in 1985, is a Polish national and was married to a Polish national. The couple have children together, a daughter born in 2005 and a daughter born in 2010. The applicant has been separated from his wife since 2012/2013. The couple were divorced in January 2019. At the end of 2012/start of 2013, the family moved from the Netherlands to Germany. The applicant and his two daughters were registered in E/Germany from 10 January 2013 to 31 July 2014. His wife was registered in E/Germany in the period from 10 January 2013 to 8 April 2016. After moving to Germany, the applicant’s wife worked for a Dutch employer in the Netherlands up to 22 February 2016 and then moved to Poland in the course of 2016.
- 3 From 22 October 2014, the applicant and his two daughters were registered in Ki/Germany. On 11 December 2014, the younger daughter switched to live with her mother. Since 27 February 2015, the applicant and his older daughter have continuously been registered at the same address in K/Germany, and since 14 September 2015 the younger daughter has also been registered there.
- 4 The older daughter attended the 4th year of a primary school from 1 August 2016 and the 5th year of a comprehensive school, as secondary school, from 1 August 2017. The younger daughter attended a primary school continuously from 1 August 2016.
- 5 The applicant has continuously received child benefit for the younger daughter since January 2016 and for the older daughter since March 2016. The city K granted the applicant maintenance payments in accordance with the Unterhaltsvorschussgesetz (Law on advances of maintenance payments; ‘UhVorschG’) for the older daughter for the period from 1 October 2015 to 28 October 2017 and for the younger daughter continuously for the period from 1 October 2015 onwards.
- 6 The applicant was employed in the Netherlands from 2009 to 2011. In the period from 1 January 2013 to 5 March 2015 the applicant was neither employed nor

self-employed. In the period from 6 March 2015 to 1 September 2015 he was liable to tax and social security payments whilst employed as a metal worker's assistant at a German temporary employment agency.

- 7 From 18 January to 31 October 2016, the applicant was liable to tax and social security payments whilst employed as a full-time production worker. In the period from 4 October to 7 December 2016, the applicant was unable to work. Due to his incapacity to work in the period from 4 to 29 October 2016 the applicant continued to receive wages payment from his employer and then cash sickness benefit from the sickness insurance scheme in the period from 30 October to 7 December 2016.
- 8 The applicant received unemployment benefit from the Bundesagentur für Arbeit (Federal Employment Agency) from 23 February to 12 April 2017 and from 12 June to 23 October 2017. On 2 January 2018 the applicant started full-time employment.
- 9 In the period from 1 September 2016 to 7 June 2017, the applicant and his two daughters received basic social security benefits in accordance with the SGB II. In June 2017, the applicant requested the further granting of basic social security benefits for himself and his two daughters. The defendant refused this request by decision of 13 June 2017. After the appeal filed by the applicant against this had been rejected by opposition decision of 27 July 2017, the applicant brought proceedings before the Sozialgericht Düsseldorf (Social Court, Düsseldorf, Germany), by means of which he sought a ruling requiring the defendant to pay him and his two daughters basic social security benefits in accordance with the SGB II for the period at issue.
- 10 The Sozialgericht Düsseldorf upheld the action by judgment of 8 May 2018. The defendant filed an appeal against this judgment before the referring court.

Brief summary of the basis for the reference

- 11 The conditions for entitlement to basic social security benefits in accordance with Paragraph 7(1) of the SGB II were present in the period at issue in the case of the applicant and his two daughters. They were in particular in need of assistance in the period at issue within the meaning of Paragraph 7(1), first sentence, point 3, Paragraph 9 of the SGB II, as their income during this period (unemployment benefit or child benefit and advance of maintenance payment) was lower than their level of need within the meaning of the SGB II.
- 12 However, benefit entitlement of the applicant and his two daughters is excluded for the period at issue under Paragraph 7(1), second sentence, indent (c) of the SGB II. In accordance with this provision, foreign nationals who derive their right of residence from Article 10 of Regulation No 492/2011 are excluded from the basic social security benefits under the SGB II.

- 13 In the period at issue, the applicant's daughters had an autonomous right of residence, that is to say independently of their parents, arising from Article 10 of Regulation No 492/2011 (cf. judgments of 30 June 2016, *NA*, C-115/15, EU:C:2016:487; of 13 June 2013, *Hadj Ahmed*, C-45/12, EU:C:2013:390; of 8 May 2013, *Alarape and Tijani*, C-529/11, EU:C:2013:290; of 14 June 2012, *Commission v Netherlands*, C-542/09, EU:C:2012:346; of 6 September 2012, *Czop and Punakova*, C-147/11 and C-148/11, EU:C:2012:538, and of 23 February 2010, *Ibrahim and Secretary of State for the Home Department*, C-310/08, EU:C:2010:80, and *Teixeira*, C-480/08, EU:C:2010:83). This is because they were the minor children of a former (migrant) worker and attended general educational courses within the meaning of Article 10 of Regulation No 492/2011.
- 14 The applicant derived a right of residence in the period at issue from this right of residence of the two daughters on the basis of Article 10 of Regulation No 492/2011, as he was the primary carer for the two children (cf. the case-law cited above in paragraph 13).
- 15 In the period at issue, the applicant and his daughters — by contrast to the period from 1 September 2016 to 7 June 2017 in respect of which they had been granted basic social security benefits — had no right of residence on the basis of Paragraphs 2 and 3 of the FreizügG/EU.
- 16 It is therefore questionable and relevant to the decision in the present case whether the exclusion from benefits in accordance with Paragraph 7(1), second sentence, point 2(c), of the SGB II of persons who derive their right of residence from Article 10 of Regulation No 492/2011 is in breach of provisions of EU law. It is a matter of dispute in the national case-law whether the exclusion from benefits of Paragraph 7(1), second sentence, point 2(c), of the SGB II infringes the principle of equal treatment of Article 18 TFEU in conjunction with Articles 10 and 7 of Regulation No 492/2011 and in conjunction with Article 4 of Regulation No 883/2004, and thus produces no effect due to the priority of application of European provisions.

The first question

Question 1(a)

- 17 Paragraph 7(1), second sentence, point 2(c), of the SGB II provides for the exclusion of Union citizens having a right of residence arising from Article 10 of Regulation No 492/2011 from receipt of social assistance within the meaning of Article 24(2) of Directive 2004/38. The basic social security benefits under the SGB II are social assistance within the meaning of Article 24(2) of Directive 2004/38 and special non-contributory cash benefits within the meaning of Articles 3(3) and 70(2) of Regulation No 883/2004 (judgments of 25 February 2016, *Garcia-Nieto*, C-299/14, EU:C:2016:114; of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597; and of 11 November 2014, *Dano*,

C-333/13, EU:C:2014:2358). These benefits are used to defray the subsistence costs of children and their parents.

- 18 The referring court takes the view that social assistance within the meaning of Article 24(2) of Directive 2004/38 and special non-contributory cash benefits within the meaning of Articles 3(3) and 70(2) of Regulation No 883/2004 which are used to safeguard the subsistence of a child and the parent who is the primary carer for the child during school or vocational education, constitutes social advantages within the meaning of Article 7(2) of Regulation No 492/2011, even though the social assistance does not require the child's attendance at an educational establishment. A special education reference for social assistance within the meaning of Article 24(2) of Regulation No 2004/38 is not necessary.

Question 1(b)

- 19 If social assistance within the meaning of Article 24(2) of Directive 2004/38 which is used to safeguard the subsistence of a child and the parent who is the primary carer for the child without a special education reference involves social advantages in accordance with Article 7(2) of Regulation No 492/2011, the provision of Paragraph 7(1), second sentence, point 2(c), of the SGB II, in the view of the referring court, infringes the requirement of equal treatment arising from Article 10, in conjunction with Article 7, of Regulation No 492/2011, such that this provision of the SGB II is not applicable.
- 20 According to the case-law of the Court of Justice, Article 7(2) and Article 12 of Regulation No 1612/68, the precursor provisions of Article 7(2) and Article 10 of Regulation No 492/2011 having the same content, do have different personal scopes. However, both those provisions lay down, in the same way, a general rule which, in matters of education, requires every Member State to ensure equal treatment between, on the one hand, its own nationals and, on the other, the children of workers established within its territory who are nationals of another Member State (judgment of 14 June 2012, *Commission v Netherlands*, C-542/09, EU:C:2012:346). Accordingly, differentiation on the basis of nationality in the context of the receipt of social advantages is not permissible. This applies both to the conditions for admission and to all advantages conferred with the objective of facilitating participation in education. In its case-law the Court of Justice has not hitherto drawn a distinction between education costs and subsistence costs (cf. in relation to maintenance aid for studies, judgment of 14 December 2016, *Bragança Linares Verruga and Others*, C-238/15, EU:C:2016:949). This principle of equal treatment also applies to the parent who is the primary carer who derives his right of residence from the right of residence of his child on the basis of Article 10 of Regulation No 492/2011. The right of residence exists independently of the parent having sufficient resources to cover his subsistence, comprehensive sickness insurance cover or other provisions restricting residence (judgments of 23 February 2010, *Ibrahim and Secretary of State for the Home Department*, C-310/08, EU:C:2010:80, and *Teixeira*, C-480/08, EU:C:2010:83).

- 21 The benefit exclusion in accordance with Paragraph 7(1), second sentence, point 2(c), of the SGB II is related to the nationality of the applicant — ‘foreign nationals’. This is therefore indirect discrimination. In the national case-law, it is a matter of dispute whether the exception of Article 24(2) of Directive 2004/38 (cf. in that regard judgments of 25 February 2016, *Garcia-Nieto*, C-299/14, EU:C:2016:114; of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597; and of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358) is directly or analogously applicable to Union citizens with a right of residence arising from Article 10 of Regulation No 492/2011 and justifies an exclusion of this group of persons from social assistance within the meaning of Article 24(2) of Directive 2004/38.
- 22 The German legislature has thus founded the conformity of Paragraph 7(1), second sentence, point 2(c), of the SGB II with European law on the argument that the provision was required in order to prevent the provisions of Directive 2004/38 ‘running dry’. It has apparently referred to recital 10 of this directive, according to which the objective of the directive is to avoid an unreasonable burden being placed on the social assistance system of the host Member State; it thus served the objective of maintaining the financial equilibrium of the social security systems (cf. judgments of 25 February 2016, *Garcia-Nieto*, C-299/14, EU:C:2016:114; of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597; and of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358). In this connection, the German legislature apparently assumed that the exception of Article 24(2) of Directive 2004/38 is at least analogously applicable where the eligible persons having a right of residence arising from Article 10 of Regulation No 492/2011 involve persons who, as non-working Union citizens without sufficient resources and comprehensive sickness insurance cover, cannot claim a right of residence on the basis of Directive 2004/38 or can claim a right of residence only for seeking employment.
- 23 It is also argued in the national case-law that Article 24(2) of Directive 2004/38 is not restricted to the scope of Article 24(1) of Directive 2004/38. Article 24(2) of Directive 2004/38 is a derogation from the principle of equal treatment provided for in Article 18 TFEU, of which Article 24(1) of Directive 2004/38 is merely a specific expression (cf. judgment of 21 February 2013, *N*, C-46/12, EU:C:2013:97). Article 24(2) of Directive 2004/38 therefore provided for an exception from the principle of equal treatment of Article 18 TFEU when a claim for social assistance is made in the host Member State, even if the Union citizen had an independent right of residence arising from Article 10 of Regulation No 492/2011. It can be deduced with sufficient clarity from the case-law of the Court of Justice (judgments of 25 February 2016, *Garcia-Nieto*, C-299/14, EU:C:2016:114; of 15 September 2015, *Alimanovic*, C-67/14, EU:C:2015:597; and of 11 November 2014, *Dano*, C-333/13, EU:C:2014:2358) that the Court of Justice links the validity of the prohibition on discrimination to a right of residence in accordance with Directive 2004/38 and does not regard other rights of residence as decisive with regard to equal treatment of the Union citizen with nationals of the host Member State in the case of social assistance. It is not

possible to draw the conclusion from the *Alimanovic* decision of the Court of Justice of 15 September 2015 (C-67/14, EU:C:2015:597) that the scope of Article 24(2) of Directive 2004/38 is restricted to facts that come solely under Directive 2004/38. In this decision the Court of Justice did not agree with the consideration of the family circumstances stipulated by the Advocate-General in his Opinion, namely of a right of residence arising from Article 10 of Regulation No 492/2011. This does not prevent the Court from providing a referring court with all the elements of interpretation of EU law which may be of assistance in adjudicating in the case pending before it, whether or not the referring court has specifically referred to them in the wording of its questions (cf. judgment of 12 July 2018, *Banger*, C-89/17, EU:2018:570). In the *Alimanovic* judgment, the Court confirmed the conformity with European law of the benefit exclusion from social assistance for Union citizens who, under Directive 2004/38, had solely a right of residence in order to seek employment arising from Article 14(4)(b) of Directive 2004/38, without providing any indication that in the case of a right of residence of the applicant at that time in accordance with Article 10 of Regulation No 492/2011 a justification of the unequal treatment in the granting of certain kinds of social assistance was excluded by means of Article 24(2) of Directive 2004/38. It did not deal with a right of residence resulting from the applicant's children attending school in Germany on the basis of Article 10 of Regulation No 492/2011.

- 24 However, the view is also put forward in the national case-law, likewise with reference to the arguments in the judgment of 15 September 2015, *Alimanovic* (C-67/14, EU:C:2015:597), that the exception of Article 24(2) of Directive 2004/38 could justify the exclusion of social assistance for persons whose right of residence was determined by that directive. However, the scope of Article 24(2) of Directive 2004/38 cannot be extended to persons having an independent right of residence in accordance with Regulation No 492/2011. The legislature cannot derive any authorisation, on the basis of Article 24(2) of Directive 2004/38, to exclude Union citizens having a right of residence arising from Article 10 of Regulation No 492/2011 from social advantages within the meaning of Article 7(2) of that regulation, even though this involves social assistance within the meaning of Article 24(2) of Directive 2004/38. On the basis of its wording 'By way of derogation from paragraph 1' and its factual connection, the exception of Article 24(2) of Directive 2004/38 refers to the principle of equal treatment outlined in paragraph 1. This is applicable to Union citizens who are entitled to rights of residence 'on the basis of this Directive' 'subject to such specific provisions as are expressly provided for in the Treaty and secondary law'. The principle of equal treatment in accordance with the first sentence of Article 24(1) of Directive 2004/38 and the extension thereof to the group of persons in accordance with the second sentence of Article 24(1) of Directive 2004/38 thus even requires a right of residence arising from that directive. The first sentence of Article 24(1) of Directive 2004/38 is not applicable to Union citizens having an inherent and autonomous right of residence independent of the rights of residence provided for in Directive 2004/38, for example the right of residence arising from Article 10 of Regulation No 492/2011.

- 25 The referring court agrees with this last-presented view. The right of residence arising from Article 10 of Regulation No 492/2011 is not subject to the provisions of Directive 2004/38. Once acquired, the rights of education and residence of the children or of the parents (who have custody or are the primary carer of the children) continue to exist, in accordance with the case-law of the Court, independently of the conditions imposed in Directive 2004/38 for sufficient resources and a comprehensive sickness insurance cover and are to be applied autonomously with respect to the provisions under EU law that govern the conditions for exercising the right of residence in another Member State. The Court has inferred from the development history and content of Directive 2004/38 that the scope of Article 12 of Regulation No 1612/68, the precursor provision to Article 10 of Regulation No 492/2011 having the same content, precisely should not be restricted by Directive 2004/38 (judgments of 23 February 2010, *Ibrahim and Secretary of State for the Home Department*, C-310/08, EU:C:2010:80, and *Teixeira*, C-480/08, EU:C:2010:83).
- 26 The Court has also rejected a corresponding application of the exception in Article 24(2) of Directive 2004/38 concerning maintenance aid for studies to the principle of equal treatment resulting from Articles 7(2) and 10 of Regulation No 492/2011 (judgment of 14 December 2016, *Bragança Linares Verruga and Others*, C-238/15, EU:C:2016:949). The referring court takes the view that this also applies to the social assistance covered by the rule in Article 24(2) of Directive 2004/38 if this constitutes a ‘social advantage’ within the meaning of Article 7(2) of Regulation No 492/2011, even though this social assistance is not expressly education-related. In enacting Regulation No 492/2011 in 2011, the EU legislature did not feel compelled to restrict the principle of equal treatment arising from Articles 7(2) and 10 of Regulation No 492/2011 in comparison with the precursor provision. It therefore did not react to the decision of the Court in the previous year, under which a parent who has custody of a child in education has a right of residence derived therefrom together with that child, even though the parent does not have a right of residence of his own based on the provisions of Directive 2004/38 (judgments of 23 February 2010, *Ibrahim and Secretary of State for the Home Department*, C-310/08, EU:C:2010:80, and *Teixeira*, C-480/08, EU:C:2010:83).

The second question

- 27 Every Union citizen may, in all situations coming within the objective scope of EU law, rely on the prohibition of discrimination on the grounds of nationality arising from Article 18 TFEU. These situations include those concerning the exercise of the right to move and reside freely within the territory of the Member States conferred by Article 20(2), first subparagraph, (a) TFEU and Article 21 TFEU. The prohibition of discrimination on the grounds of nationality is made concrete for the area of granting of social benefits in Article 4 of Regulation No 883/2004. According to this, unless otherwise provided for by that regulation, persons to whom that regulation applies are to enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the

nationals thereof. Article 4 of Regulation No 883/2004 prohibits any unequal treatment on the grounds of nationality and requires that Union citizens with foreign nationality be treated in the same way as domestic nationals.

- 28 Regulation No 883/2004 applies to the applicant both personally and objectively. He is a Union citizen (Article 2(1) of Regulation No 883/2004) who, as a national of one Member State (Poland), lives in a different Member State (Germany). In the period at issue he was — due to his entitlement to child benefit — integrated into a family benefit system within the meaning of Article 3(1)(j) of Regulation No 883/2004 (cf. in this regard judgment of 14 June 2016, *Commission v United Kingdom*, C-308/14, EU:C:2016:436) and — due to receipt of unemployment benefit up to 23 October 2017 — integrated into the social security system in the case of unemployment within the meaning of Article 3(1)(h) of that regulation.
- 29 The basic social security benefits under the SGB II are special non-contributory cash benefits within the meaning of Articles 3(3) and 70(2) of Regulation No 883/2004 to which the principle of equal treatment of Article 4 of that regulation applies (judgment of 20 May 2014, *Dano*, C-333/13, EU:C:2014:2358).
- 30 Regulation No 883/2004 does not itself provide for a restriction of the principle of equality governed in Article 4 thereof on the grounds of nationality. However, the benefit exclusion in accordance with Paragraph 7(1), second sentence, point 2(c), of the SGB II relates to the nationality of the applicant — ‘foreign nationals’. This therefore amounts to indirect discrimination. The granting of social benefits to economically inactive Union citizens may, it is true, be made dependent on the lawfulness of their residence (judgment of 14 June 2016, *Commission v United Kingdom*, C-308/14, EU:C:2016:436). However, this does not prevent a claim by the applicant. He is materially legally resident in Germany — namely on the basis of his right of residence derived from Article 10 of Regulation No 492/2011.
- 31 It is a matter of dispute in the national case-law whether the prohibition of discrimination arising from Article 4 of Regulation No 883/2004 is restricted by Article 24(2) of Directive 2004/38 if the Union citizen entitled to make a claim has a right of residence arising from Article 10 of Regulation No 492/2011 which is independent of Directive 2004/38. Reference is made to the arguments relating to Question 1(b).