

Case C-94/20**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 2020

Referring court:

Landesgericht Linz (Regional Court, Linz, Austria)

Date of the decision to refer:

6 February 2020

Applicants and respondents:

KV

Defendant and appellant:

Land Oberösterreich (Land of Upper Austria)

Subject matter of the case in the main proceedings

Social benefit in the form of housing assistance for third-country nationals who are long-term residents solely after proof of a basic command of German — Compatibility with European Union law — Discrimination based on racial or ethnic origin

Subject matter and legal basis of the reference

Interpretation of EU law; Article 267 TFEU

Questions referred

1. Is Article 11 of Directive 2003/109/EC to be interpreted as precluding national legislation, such as Paragraph 6(9) and (11) of the Oberösterreichisches Wohnbauförderungsgesetz (Upper Austrian Law on Housing Subsidies, ‘the oöWFG’), which allows EU citizens, EEA nationals and family members within the meaning of Directive 2004/38/EC 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/EC 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 Oberösterreichisches Mindestsicherungsgesetz (Upper Austrian Law on Guaranteed Minimum Benefits)) 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/EC 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/EC 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/EC) 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 of Fundamental Rights to be interpreted as precluding national legislation such as Paragraph 6(9) and (11) oöWFG, which allows EU citizens, EEA nationals and family members within the meaning of Directive 2004/38/EC 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/EC) to provide particular proof of a basic command of German?

Community legislation cited

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;

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents, in particular Article 11,

Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, in particular Articles 1-3,

Charter of Fundamental Rights of the European Union, in particular Articles 21, 34, 51, 52

National legislation cited

Oberösterreichisches Wohnbauförderungsgesetz (Upper Austrian Law on Housing Subsidies, ‘the oöWFG’), in particular Paragraph 6(9), (11), (23) and (24)

Oberösterreichisches Antidiskriminierungsgesetz (Upper Austrian Non-Discrimination Law, ‘the oöADG’), Paragraphs 1-4, 8

Oberösterreichische Wohnbeihilfen-Verordnung (Upper Austrian Ordinance on Social Housing Assistance); in particular Paragraphs 2-4

Oberösterreichisches Mindestsicherungsgesetz (Upper Austrian Law on Guaranteed Minimum Benefits, ‘the oöBMSG’), in particular Paragraphs 1, 4, 5, 6, 7, 8, 13

Brief summary of the facts and procedure

- 1 The applicant, a Turkish national born in 1981, has lived in Austria since 1997 and is a ‘third-country national who is a long-term resident’ within the meaning of Directive 2003/109. He lives with his wife and three children in the Land of Upper Austria and, until the end of 2017, received housing assistance pursuant to the oöWFG. Since 1 January 2018 — unlike for citizens of the Union, nationals of an EEA State and family members within the meaning of Directive 2004/38/EC — eligibility for housing assistance for third-country nationals is subject to proof of a certain basic command of German in accordance with Paragraph 6(9)(3) and Paragraph 6(11) of the oöWFG. The applicant has a command of German at the required level but does not have any of the requisite formal evidence, which is why his application for housing assistance was rejected. He meets all of the other conditions and would receive housing assistance if he were an EEA national.
- 2 The applicant seeks damages from the Land Oberösterreich amounting to the loss of housing assistance from January until November 2018, namely EUR 281,54 per month plus damages for non-material harm of EUR 1,000. The applicant bases his claim on Paragraph 8 oöADG.
- 3 The court of first instance upheld the claim in all respects. The Land Oberösterreich brought an appeal against that decision before the referring court.

- 4 The court of first instance held that housing assistance was a core benefit within the meaning of Article 11(4) of Directive 2003/109. At the same time, it held that the requirement to prove a certain command of German was inappropriate and discriminated against the applicant on grounds of his ‘ethnicity’.

Principal arguments of the parties in the main proceedings

- 5 The applicant maintained that Paragraph 6(9)(3) and Paragraph 6(11) of the oöWFG placed him at a disadvantage by reason of his ethnicity without any objective justification. In addition, he argued that housing assistance was a core benefit within the meaning of Article 11(4) of Directive 2003/109.
- 6 The Land Oberösterreich considers that there is no difference in treatment on grounds of ethnicity, the requirement to speak German is objectively justified and housing assistance does not constitute a core benefit within the meaning of Directive 2003/109/EC.

Brief summary of the grounds for the request for a preliminary ruling

The relationship between the questions referred for a preliminary ruling

- 7 Questions 1 and 2 should be answered independently of each other. If housing assistance must be regarded as a core benefit within the meaning of Article 11(4) of Directive 2003/109 it must, from the point of view of EU law, be granted to the applicant on that ground alone, irrespective of whether there is also discrimination. In addition to the loss of housing assistance, the applicant also claims damages for non-material harm due to discrimination on grounds of his ethnicity.
- 8 Even if housing assistance is not considered to be a core benefit within the meaning of Article 11(4) of Directive 2003/109, it is nevertheless conceivable that the provision of Paragraph 6(9) and (11) of the oöWFG constitutes unlawful discrimination within the meaning of Directive 2000/43 or that it is contrary to the Charter of Fundamental Rights. The referring court considers that, in applying the exception provided for in Article 11(4) of Directive 2003/109, the Land Oberösterreich is required, when structuring such a provision, to comply with other requirements of EU law such as Directive 2000/43 and the Charter of Fundamental Rights and must not apply any discriminatory criteria in doing so. Recital 5 of Directive 2003/109 expressly states that Member States are to give effect to this Directive without discrimination on the basis of, inter alia, race, colour, ethnic or social origin, genetic characteristics or language. According to the referring court, the question whether Paragraph 6(9) and (11) of the oöWFG infringes Directive 2000/43 or the Charter of Fundamental Rights must therefore be assessed independently of Article 11 of Directive 2003/109.

- 9 As regards the relationship between Directive 2000/43 and the Charter of Fundamental Rights, the referring court anticipates that the Court of Justice will assess any discrimination that falls within the scope of Directive 2000/43 primarily on the basis of that Directive and will revert to the Charter of Fundamental Rights only if it comes to the conclusion that the facts of the main proceedings are not covered by the scope of a secondary law, which gives concrete expression to the prohibition of discrimination laid down in the Charter of Fundamental Rights (see, for example, the judgment of the Court of Justice in Case C-555/07, *Küçükdeveci*).
- 10 In the present proceedings, it is conceivable that Directive 2000/43 is not applicable on account, in particular, of Article 3(2) thereof. However, according to the referring court that would not necessarily mean that there is also no discrimination as prohibited by the Charter of Fundamental Rights, inter alia because the Charter of Fundamental Rights does not contain any exception consistent with Article 3(2) of Directive 2000/43. As regards Article 3(2) of Directive 2000/43, inter alia the question arises whether that article actually excludes from the scope of that Directive (by reference to the criterion of nationality) indirect discrimination on grounds of ethnic origin, which would otherwise be covered by that Directive, or whether, in the situations covered by Article 3(2) of that Directive, already no indirect discrimination on grounds of ethnicity may exist, with the effect that that article is to be regarded as a mere clarification.
- 11 Furthermore, according to the referring court, it is possible that Paragraph 6(9) and (11) of the oöWFG might be contrary to European Union law for infringement of the Charter of Fundamental Rights, although neither Directive 2003/109 nor Directive 2000/43 precludes that paragraph since those Directives cannot restrict the scope of the prohibitions of discrimination laid down in the Charter (see, for example, Opinion of Advocate General Kokott in Case C-236/09 *Test-Achats*, points 29 and 30).

‘Core benefits’ within the meaning of Article 11(4) of Directive 2003/109

- 12 According to the Ausschuss für Wohnbau, Baurecht und Naturschutz (Committee for Housing, Construction Law and Protection of the Environment, ‘Committee’) of the Landtag (State Parliament) of Upper Austria, housing assistance is not a core social benefit within the meaning of Article 11(4) of Directive 2003/109. The requirements laid down by that Directive with regard to core benefits are covered by the oöBMSG. An amendment to the law in 2013 provided, inter alia, that third country nationals had to satisfy certain minimum income requirements in the previous five years; this requirement did not apply to Austrian nationals or to persons treated as such. In the view of the referring court, that Committee had therefore expressed the view that the Landtag of Upper Austria intended to make use of the exception provided for in Article 11(4) of Directive 2003/109. However, third-country nationals (including third-country nationals who are long-

term residents) were not generally excluded from entitlement to housing assistance, but additional conditions were imposed on those persons.

- 13 The Court of Justice has dealt with the concept of core benefits in Case C-571/10, *Kamberaj*, in relation to housing benefits in South Tyrol. It stated in that regard, that that concept covers social assistance or social protection benefits which enable individuals to meet their basic needs such as food, accommodation and health (paragraph 91). On that basis, referring to Article 34 of the Charter of Fundamental Rights, the Court identified criteria to be taken into account by the national court in its assessment of the classification of housing assistance as a core benefit in the remainder of the proceedings. The Court held that the objective of that benefit, its amount, the conditions subject to which it is awarded and its place in the Italian system of special assistance had to be considered (paragraph 92).
- 14 The referring court considers that the application of those principles to the Upper Austrian housing assistance provisions is not clear. The objective of the housing assistance is to avoid excessive burdens due to housing costs. In terms of amount and in terms of the conditions for granting it, housing assistance constitutes a subsidy to housing costs which depends, *inter alia*, on income, number of household members and size of the home, and which is capped at EUR 300. Housing assistance is not intended to fully cover the housing costs of a recipient of the payment, but typically covers part of the housing costs in order to prevent individuals on low incomes from being required to spend too large a proportion of their income on adequate housing.
- 15 The guaranteed minimum benefits provided by the *oöBMSG* (in the applicable version), however, are intended to generally enable persons suffering social hardship to lead a dignified life, including covering their housing needs. The guaranteed minimum benefits provisions are subject to significantly stricter conditions than housing assistance and may be granted to individuals without any income or on extremely low incomes. It requires a significantly higher degree of social need. Thus, individuals on incomes that, while being low, still provide a livelihood in principle — in terms of the conditions for the grant of guaranteed minimum benefits — may receive housing assistance but are not entitled to guaranteed minimum benefits. In certain cases, it is possible to receive both housing assistance and guaranteed minimum benefits (where applicable, these are partly set-off against each other). However, the target groups of those two social benefits are not identical.
- 16 In the light of that regulatory framework the referring court asks whether (and, if so, in what additional circumstances) solely benefits covered by the *oöBMSG* are to be regarded as core benefits within the meaning of Article 11(4) of Directive 2003/109, or whether that is also the case with regard to housing assistance provided for by the *oöWFG*, as that housing assistance is also intended to compensate for excessive burdens in terms of housing costs, even if, unlike the guaranteed minimum benefits, it does not require that the beneficiary is suffering social hardship.

Discrimination based on ‘racial or ethnic origin’ within the meaning of Directive 2000/43

- 17 The oöADG transposes Directive 2000/43, which refers to ‘ethnicity’ instead of ‘racial or ethnic origin’. However, as a general rule, that term has the same meaning as the concepts of ‘racial or ethnic origin’ in EU law.
- 18 In the view of the referring court, a difference in treatment based on the criterion of status as a third-country national does not, in principle, fall within the scope of that Directive due to Article 3(2) of Directive 2000/43 (judgment of the Court of Justice, Case C-571/10, *Kamberaj*, in particular paragraphs 48-50, and Case C-668/15, *Jyske Finans*).
- 19 The question which arises, however, is whether the reference to nationality may nevertheless, under certain conditions, constitute indirect discrimination based on ethnic origin. According to the referring court, it would be possible, by referring to the formal criterion of nationality, to indirectly pursue objectives which may be regarded as constituting indirect discrimination on grounds of ethnic origin.
- 20 In the present case, the referring court is concerned with a provision which not only makes a distinction based on the nationality of the third-country national but which, linked to this, sets out a requirement of a certain level of German proficiency, evidence of which may only be furnished in certain, clearly defined ways (Paragraph 6(9) and (11) of the oöWFG). In the view of the referring court, it is unclear how such a case is to be categorised, in particular in the light of the scope of that directive and the exception provided for in Article 3(2) of Directive 2000/43.
- 21 In the event that Paragraph 6(9) and (11) of the oöWFG had to be assessed in terms of indirect or ‘covert’ discrimination, it would be necessary to examine the objective justification of that provision within the meaning of Article 2(2)(b) of Directive 2000/43. The purpose of Paragraph 6 (9) and (11) of the oöWFG was more restricted access for third-country nationals to housing assistance, with the main argument specifically in favour of the required proficiency in German being that this was an important element for social integration.
- 22 According to the referring court it is worth considering whether the present requirement for proof of German proficiency for the grant of housing assistance — in particular if structured in the way it is here — can be regarded as objectively justified. On the one hand, it could be considered questionable why a language requirement should be necessary in addition to the other conditions laid down by the oöWFG, subject to which third-country nationals may, in any event, receive housing assistance only if they have lived in Austria for more than 5 years and, as a general rule, have already worked for a number of years. On the other hand, an additional requirement of proof of German proficiency could be regarded as a cause for concern particularly in the case of third-country nationals who are long-term residents within the meaning of Directive 2003/109 since those persons

have already had to satisfy various integration-related conditions stipulated by the österreichisches Niederlassungs- und Aufenthaltsgesetz (Austrian Law on Settlement and Residence) in order to obtain that status (see, from the point of view of EU law, Article 5(2) of Directive 2003/109). In addition, doubts might also be cast on the reasons why the relatively basic German proficiency level required can be demonstrated solely through the specific, formal evidence required by statute.

Requirements of the Charter of Fundamental Rights

- 23 Should the Court of Justice consider that Directive 2000/43 does not apply to the situation at issue in the main proceedings, in particular due to Article 3(2) thereof, the referring court asks whether the rule laid down in Paragraph 6(9) and (11) of the oöWFG must be assessed in the light of the Charter of Fundamental Rights. The Charter needs to be taken into consideration pursuant to Article 51(1) of the Charter of Fundamental Rights in the implementation of European Union law. In the light of the case-law relating to the scope of the Charter of Fundamental Rights, the referring court takes the view that it is likely that a provision such as Paragraph 6(9) and (11) of the oöWFG may only be structured with the provisions of the Charter in mind. The Charter may, inter alia, be applicable because there are principles under EU law concerning the grant of social benefits to third-country nationals who are long-term residents, and the national legislation at issue in the main proceedings may be regarded as implementing those principles (see also recital 5 of Directive 2003/109).
- 24 Article 21 of the Charter of Fundamental Rights provides, inter alia, a prohibition of any discrimination on grounds of ethnic origin. Any limitation on the exercise of the rights and freedoms recognised by the Charter is to be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations are to be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others (Article 52(1) Charter of Fundamental Rights).
- 25 As regards the referring court's considerations relating to the objective justification of Paragraph 6(9) and (11) of the oöWFG, reference is made to the considerations relating to Directive 2000/43. Those considerations may be applied accordingly to the review of proportionality in accordance with Article 52(1) of the Charter of Fundamental Rights.