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Court of Justice of the European Union

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Advocate General's Opinion in Case C-709/20
The Department for Communities in Northern Ireland

Advocate General Richard de la Tour: The grant without conditions as to resources of a right of residence by a Member State to Union citizens cannot have the effect of systematically excluding them from social assistance granted to nationals of that State without constituting discrimination based on nationality

The refusal of those benefits, in so far as it is systematic and based on the nature of the legal right of residence, even though it is justified by concern for the protection of the financial equilibrium of the financial assistance system, goes beyond what is necessary to achieve that objective

On 4 June 2020, CG, a Dutch and Croatian national, was granted pre-settled status in the United Kingdom on the basis of the EU Settlement Scheme – Immigration Rules Appendix EU¹. In June 2020, CG's application for Universal Credit was refused by the Department for Communities in Northern Ireland. CG claims, in that regard, that the refusal to grant her social assistance, when she was granted a right of residence for a fixed period under national law, constitutes different treatment by comparison with British citizens and therefore discrimination on the ground of nationality.

The Appeal Tribunal for Northern Ireland, hearing the case, referred a set of questions to the Court of Justice seeking to ascertain whether there is direct or indirect discrimination, for the purposes of Article 18 TFEU, as a result of the exclusion of certain Union citizens residing in the United Kingdom from social benefits owing to the nature of the right of residence granted to them on the basis of national law.

In today's Opinion, Advocate General Jean Richard de la Tour proposes that the Court find that Article 24 of Directive 2004/38² on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, must be interpreted as meaning that the legislation of a Member State under **which an economically inactive national of another Member State who has a right of residence, granted without conditions as to resources in application of a national provision, is unable to receive social assistance solely because of the nature of his or her right of residence constitutes indirect discrimination on the ground of nationality and goes beyond what is necessary to maintain the equilibrium of the social assistance system of the host Member State if the refusal of such assistance has a greater effect on, or affects a greater number of, the nationals of other Member States than those of the host State** – which it is for the referring court to ascertain – when that legislation does not require an examination of the individual circumstances that characterise the situation of the person concerned and does not require, in particular, that his

¹ The EU Settlement Scheme – Immigration Rules Appendix EU ('Appendix EU') creates, according to the explanations provided by the United Kingdom Government, a new system conceived in preparation for and in consequence of the withdrawal of the United Kingdom from the European Union. It allows all citizens of the European Union, the European Economic Area (EEA) and Switzerland residing in the United Kingdom before 31 December 2020 and their family members to seek leave to remain in the United Kingdom. Appendix EU entered into force on 30 March 2019. It provides that applications for leave to remain must be submitted no later than 30 June 2021.

² 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/EE (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35 and OJ 2005 L 197, p. 34). ('Directive 2004/38').

or her situation of extreme poverty, the right to respect for family life and the best interests of his or her child be taken into account.

The Advocate General considers first that, since **all the facts and all the relevant national provisions** relate to either **before** or **during the transition period**, and since the referring court's request was registered by the Registry on 20 December 2020, the Court has jurisdiction to rule on the request for a preliminary ruling on the basis of the Agreement on the withdrawal of the United Kingdom.³

Next, the Advocate General proposes that the Court consider that the referring court is asking it, in essence, whether the legislation of a Member state which excludes from social assistance Union citizens to whom it has granted a legal right of residence that is not conditional on resources, although such assistance is guaranteed to nationals of the Member State concerned who are in the same situation of extreme poverty constitutes discrimination based on nationality for the purposes of Directive 2004/38, and whether, should this be the case, such discrimination may be justified.

The Advocate General notes that the Court has held that the benefit of equal treatment in the context of Directive 2004/38 is no longer restricted to the situations referred to in that directive, in so far as it also applies to those in which the right of residence is based on another provision of secondary law, but it has not ruled on the effects relating to discrimination based on nationality of the adoption by a Member State of more favourable measures within the meaning of Article 37 of that Directive. Thus, it is now necessary to determine the conclusions to be drawn for the interpretation of Article 24 of that directive from the grant of legal residence to Union citizens by a Member State in conditions more favourable than those laid down in that directive with respect to the decision to exclude those citizens from social assistance on the sole ground of their pre-settled status.

The principle of equal treatment, as laid down in Article 24(1) of Directive 2004/38 with the derogations set out in Article 24(2), could, in the view of the Advocate General, lead to that provision being interpreted as precluding, in principle, the legislation of a Member State under which **nationals of other Member States residing on its territory are excluded from the benefit of social assistance enjoyed by the nationals of the host State, since they have a right of residence granted to them by that State.**

However, Mr Richard de la Tour considers that **the fact that no conditions are imposed for the grant of a right of residence must not have the effect of obliging Member States to refrain from carrying out any check as regards entitlement to social benefits** and that **the host Member State should be entitled to impose lawful restrictions on the grant of social benefits** in order to ensure that 'persons exercising their right of residence should not ... become an unreasonable burden on the social assistance system of the host Member State'.

According to the Advocate General, it would not be contrary to the principle of equal treatment laid down in Article 24(1) of Directive 2004/ that there could exist, for Union citizens residing on the basis of a national right of residence, a difference in treatment between those who are economically inactive and the others, but that **the systematic nature of the refusal of access to social assistance does not seem to be proportionate to such an objective.**

The Advocate General considers that, consequently, **national legislation which does not provide that the competent authorities must carry out an assessment of all of the individual circumstances** that characterise the situation of extreme poverty of the person concerned and of the consequences of a refusal of his or her application in consideration, according to his or her situation, of the right to respect for family life and of the best interests of the child, **goes beyond what is necessary to maintain the equilibrium of the social assistance scheme of the host**

³ The Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p.7), approved by Decision (EU) 2020/135 - Council Decision (EU) 2020/135 of 30 January 2020 on the conclusion of the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community (OJ 2020 L 29, p. 1).

Member State. Accordingly, the Court's answer, concerning the examination of the consequences of the lawfulness of residence, in the light of Article 24 of Directive 2004/38, should contain indications of the various elements that may be taken into account in order to satisfy the requirement of proportionality. It would be for the referring court, which alone has jurisdiction to assess the facts, to determine, in particular in the light of those elements and by reference to the fundamental rights applicable to the individual situation, whether the grant of a subsistence allowance to a person in CG's situation is likely to represent an unreasonable burden for the national social assistance system.

NOTE: The Advocate General's Opinion is not binding on the Court of Justice. It is the role of the Advocates General to propose to the Court, in complete independence, a legal solution to the cases for which they are responsible. The Judges of the Court are now beginning their deliberations in this case. Judgment will be given at a later date.

NOTE: A reference for a preliminary ruling allows the courts and tribunals of the Member States, in disputes which have been brought before them, to refer questions to the Court of Justice about the interpretation of European Union law or the validity of a European Union act. The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

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The [full text](#) of the Opinion is published on the CURIA website on the day of delivery.

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