

**JUDGMENT OF THE COURT (Third Chamber)**

19 September 2013 <sup>\*(1)</sup>

(Freedom of movement for persons – Union Citizenship – Directive 2004/38/EC – Right of residence for more than three months – Article 7(1)(b) – Person no longer having worker status – Person in possession of a retirement pension – Having sufficient resources not to become a burden on the ‘social assistance system’ of the host Member State – Application for a special non-contributory cash benefit – Compensatory supplement intended to augment a retirement pension – Regulation (EC) No 883/2004 – Articles 3(2) and 70 – Competence of the Member State of residence – Conditions for granting – Legal right to reside on the national territory – Compliance with European Union law)

In Case C-140/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Austria), made by decision of 14 February 2012, received at the Court on 19 March 2012, in the proceedings

**Pensionsversicherungsanstalt**

v

**Peter Brey,**

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh (Rapporteur), C. Toader and C.G. Fernlund, Judges,

Advocate General: N. Wahl,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 7 March 2013,

after considering the observations submitted on behalf of:

- Mr Brey, by C. Rappold, Rechtsanwalt,
- the Austrian Government, by G. Hesse, acting as Agent,
- the German Government, by T. Henze and J. Möller, acting as Agents,
- Ireland, by E. Creedon, acting as Agent, assisted by A. Collins SC, and G. Gilmore BL,
- the Greek Government, by M. Tassopoulou, acting as Agent,
- the Netherlands Government, by M. Noort and C. Wissels, acting as Agents,
- the Swedish Government, by A. Falk and H. Karlsson, acting as Agents,

- the United Kingdom Government, by C. Murrell and J. Coppel, acting as Agents,
- the European Commission, by V. Kreuschitz and C. Tufvesson, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 29 May 2013,

gives the following

## **Judgment**

1 This request for a preliminary ruling concerns the interpretation of Article 7(1)(b) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77).

2 The request has been made in proceedings between Mr Brey and the Pensionsversicherungsanstalt (Pensions Insurance Institution) (Austria), concerning the latter's refusal to grant him the compensatory supplement (Ausgleichzulage) provided for in Austrian legislation to augment his German retirement pension.

## **Legal context**

### *European Union law*

#### Directive 2004/38

3 Under recitals 10, 16, 20 and 21 in the preamble to Directive 2004/38:

‘(10) Persons exercising their right of residence should not ... become an unreasonable burden on the social assistance system of the host Member State during an initial period of residence. Therefore, the right of residence for Union citizens and their family members for periods in excess of three months should be subject to conditions.

...

(16) As long as the beneficiaries of the right of residence do not become an unreasonable burden on the social assistance system of the host Member State they should not be expelled. Therefore, an expulsion measure should not be the automatic consequence of recourse to the social assistance system. The host Member State should examine whether it is a case of temporary difficulties and take into account the duration of residence, the personal circumstances and the amount of aid granted in order to consider whether the beneficiary has become an unreasonable burden on its social assistance system and to proceed to his expulsion. In no case should an expulsion measure be adopted against workers, self-employed persons or job-seekers as defined by the Court of Justice save on grounds of public policy or public security.

...

(20) In accordance with the prohibition of discrimination on grounds of nationality, all Union citizens and their family members residing in a Member State on the basis of this Directive should enjoy, in that Member State, equal treatment with nationals in areas covered by the Treaty, subject to such specific provisions as are expressly provided for in the Treaty and secondary law.

(21) However, it should be left to the host Member State to decide whether it will grant social assistance during the first three months of residence, or for a longer period in the case of job-seekers, to Union citizens other than those who are workers or self-employed persons or who retain that status or their family members, or maintenance assistance for studies, including vocational training, prior to acquisition of the right of permanent residence, to these same persons.'

4 Article 7(1)(b) of that directive, entitled 'Right of residence for more than three months', provides as follows:

'1. All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

...

(b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State'.

5 Article 8 of Directive 2004/38, entitled 'Administrative formalities for Union citizens', provides:

'1. Without prejudice to Article 5(5), for periods of residence longer than three months, the host Member State may require Union citizens to register with the relevant authorities.

2. The deadline for registration may not be less than three months from the date of arrival. A registration certificate shall be issued immediately, stating the name and address of the person registering and the date of the registration. Failure to comply with the registration requirement may render the person concerned liable to proportionate and non-discriminatory sanctions.

3. For the registration certificate to be issued, Member States may only require that

— ...

— Union citizens to whom point (b) of Article 7(1) applies present a valid identity card or passport and provide proof that they satisfy the conditions laid down therein,

— ...

4. Member States may not lay down a fixed amount which they regard as "sufficient resources", but they must take into account the personal situation of the person concerned. In all cases this amount shall not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where this criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

...'

6 Article 14 of Directive 2004/38, entitled 'Retention of the right of residence', states:

'...

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.

In specific cases where there is a reasonable doubt as to whether a Union citizen or his/her family members satisfies the conditions set out in Articles 7, 12 and 13, Member States may verify if these conditions are fulfilled. This verification shall not be carried out systematically.

3. An expulsion measure shall not be the automatic consequence of a Union citizen's or his or her family member's recourse to the social assistance system of the host Member State.

...'

7 Under Article 24 of that directive, entitled '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 State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence.

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), nor shall it be obliged, prior to acquisition of the right of permanent residence, to grant maintenance aid for studies, including vocational training, consisting in student grants or student loans to persons other than workers, self-employed persons, persons who retain such status and members of their families.

...'

Regulation (EC) No 883/2004

8 As of 1 May 2010, 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, and corrigendum, OJ 2004 L 200, p. 1) has replaced Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1).

9 Article 1 of Regulation No 883/2004, as amended by Commission Regulation (EU) No 1244/2010 of 9 December 2010 (OJ 2010 L 338, p. 35) ('Regulation No 883/2004'), entitled 'Definitions', provides:

'For the purposes of this Regulation:

...

(j) "residence" means the place where a person habitually resides

...'

10 Article 3 of that regulation, entitled 'Matters covered', is worded as follows:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

...

(d) old-age benefits;

...

2. Unless otherwise provided for in Annex XI, this Regulation shall apply to general and special social security schemes, whether contributory or non-contributory, and to schemes relating to the obligations of an employer or shipowner.

3. This Regulation shall also apply to the special non-contributory cash benefits covered by Article 70.

...

5. This Regulation shall not apply to:

(a) social and medical assistance

...'

11 Article 4 of that regulation, entitled 'Equality of treatment', provides:

'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.'

12 Article 70 of that regulation states:

'1. This Article shall apply to special non-contributory cash benefits which are provided under legislation which, because of its personal scope, objectives and/or conditions for entitlement, has characteristics both of the social security legislation referred to in Article 3(1) and of social assistance.

2. For the purposes of this Chapter, "special non-contributory cash benefits" means those which:

(a) are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 3(1), and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or

(ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned,

and

(b) where the financing exclusively derives from compulsory taxation intended to cover general public expenditure and the conditions for providing and for calculating the benefits are not dependent on any contribution in respect of the beneficiary. However, benefits provided to supplement a contributory benefit shall not be considered to be contributory benefits for this reason alone,

and

(c) are listed in Annex X.

3. Article 7 and the other chapters of this Title shall not apply to the benefits referred to in paragraph 2 of this Article.

4. The benefits referred to in paragraph 2 shall be provided exclusively in the Member State in which the persons concerned reside, in accordance with its legislation. Such benefits shall be provided by and at the expense of the institution of the place of residence.'

13 Annex X to Regulation No 883/2004, entitled 'Special non-contributory cash benefits', includes the following note regarding the Republic of Austria: 'Compensatory supplement (Federal Act of 9 September 1955 on General Social Insurance – [Allgemeines Sozialversicherungsgesetz, BGBl. 189/1955] ...)'.

#### *Austrian law*

14 Paragraph 292(1) of the Federal Act on General Social Insurance (Allgemeines Sozialversicherungsgesetz, BGBl. 189/1955), as amended, from 1 January 2011, by the 2011 Budget Act (Budgetbegleitgesetz 2011, BGBl. 111/201) ('the ASVG') provides that, where a retirement pension plus net revenue from other sources (plus any other amount which should be taken into account) falls short of a specific reference amount, the individual receiving that pension is to be entitled to a compensatory supplement which is equal to the difference between the reference amount and that individual's personal income, so long as he is habitually and lawfully resident in Austria.

15 The Settlement and Residence Act (Niederlassungs- und Aufenthaltsgesetz), as amended by the 2011 Budget Act ('the NAG'), includes the following relevant provisions:

#### 'Paragraph 51

1. On the basis of the Directive on freedom of movement, [European Economic Area ("EEA")] citizens are entitled to reside for periods in excess of three months, if they:

...

(2) have comprehensive sickness insurance cover for themselves and the members of their families and have sufficient resources to support themselves and the members of their families so as not to be obliged to have recourse to social assistance benefits or the compensatory supplement during their period of residence;

...

## Registration certificate

### Paragraph 53

1. EEA citizens who enjoy a right of residence under European Union law (Paragraphs 51 and 52) must, if they are residing in Austria for longer than three months, notify the authority within four months of their entry. If the conditions (Paragraphs 51 or 52) are satisfied, the authority shall, upon request, issue a registration certificate.

2. As proof of the right of residence under European Union law, a valid passport or identity card must be provided in addition to the following evidence:

...

(2) Under Paragraph 51(1)(2): Evidence of sufficient resources and of comprehensive sickness insurance cover;

...'

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

16 Mr Brey and his wife, who are both of German nationality, left Germany and moved to Austria in March 2011. In Germany, Mr Brey receives an invalidity pension of EUR 862.74 per month before tax, and a care allowance of EUR 225 per month. The couple has no other income or assets. Mr Brey's wife received a basic benefit in Germany; however, because of her move to Austria, she has not received it since 1 April 2011. The monthly rent payable on the couple's apartment in Austria is EUR 532.29.

17 By decision of 2 March 2011, the Pensionsversicherungsanstalt refused Mr Brey's application for a compensatory supplement to be granted with effect from 1 April 2011 on the ground that, owing to his low retirement pension, Mr Brey does not have sufficient resources to establish his lawful residence in Austria.

18 On 22 March 2011, the Bezirkshauptmannschaft Deutschlandberg (first-level Deutschlandberg administrative authority) (Austria) issued Mr Brey and his wife with an EEA citizen registration certificate in accordance with the NAG.

19 Mr Brey brought an action against the decision of 2 March 2011. By judgment delivered on 6 October 2011, the Oberlandesgericht Graz (Higher Regional Court, Graz), upholding the judgment delivered at first instance by the Landesgericht für Zivilsachen Graz (Regional Court for civil law matters, Graz), reversed that decision, with the result that the Pensionsversicherungsanstalt was obliged to grant Mr Brey a compensatory supplement in the amount of EUR 326.82 per month with effect from 1 April 2011.

20 The Pensionsversicherungsanstalt brought an appeal on a point of law against that judgment before the Oberster Gerichtshof (Austrian Supreme Court).

21 In the order for reference, that court notes that, in Case C-160/02 *Skalka* [2004] ECR I-5613, the Court categorised the compensatory supplement as a 'special non-contributory benefit' within the meaning of Article 4(2a) of Regulation No 1408/71 (now Article 70 of Regulation No 883/2004), because it augments a retirement pension or an invalidity pension and is by nature social assistance in so far as it is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient.

22 According to the referring court, the issue which thus arises in the proceedings pending before it is that of determining whether the EU legislation on residence uses the same concept of 'social assistance' as the EU legislation on social security.

23 If that concept were to be acknowledged as having an identical meaning in both areas, the referring court is of the view that the compensatory supplement could not be regarded as social assistance within the meaning of Directive 2004/38, since it has some social security aspects and falls within the scope of Regulation No 883/2004. Consequently, the right to a compensatory supplement would have no impact on the right of residence.

24 However, the referring court is also of the view that the concept of 'social assistance' could be given its own particular meaning based on the objectives pursued by Directive 2004/38, which is intended, inter alia, to prevent persons who have not made any contribution to financing the social security schemes of a host Member State from becoming an excessive burden on that State's budget. From that perspective, that concept, in the context of the EU legislation on residence, would have to be understood to mean the basic benefits paid by a State out of general taxation, to which all residents are entitled, whether or not those benefits are based on a right or on a state of need and whether or not there is an associated specific risk in terms of social security. In that situation, the compensatory supplement would have to be regarded as social assistance for the purposes of Directive 2004/38.

25 In those circumstances, the Oberster Gerichtshof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is a compensatory supplement to be regarded as a "social assistance" benefit within the terms contemplated in Article 7(1)(b) of Directive 2004/38 ... ?'

### **The question referred for a preliminary ruling**

#### *Scope of the question referred*

26 By its question, the referring court asks whether Article 7(1)(b) of Directive 2004/38 should be interpreted as meaning that, for the purposes of that provision, the concept of 'social assistance' covers a benefit such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG.

27 That question has arisen in a dispute in which the competent Austrian authorities refused to grant that benefit to a national of another Member State (Mr Brey) on the grounds that, despite having been issued with a certificate of residence, he could not be regarded as being 'lawfully' resident in Austria for the purposes of Paragraph 292(1) of the ASVG since, under Paragraph 51 of the NAG, the right to reside in Austria for periods in excess of three months requires the person concerned to have, inter alia, 'sufficient resources to support [himself] and the members of [his family] so as not to be obliged to have recourse to social assistance benefits or the compensatory supplement during [his] period of residence'.



28 It is common ground that Paragraph 51 of the NAG is intended to transpose into Austrian law Article 7(1)(b) of Directive 2004/38, which states that all Union citizens are to have the right of residence on the territory of another Member State for a period of longer than three months if they have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence.

29 It follows that, even though Mr Brey's right of residence is not directly at issue in the main proceedings, which concern only the grant of the compensatory supplement, the national law itself establishes a direct link between the conditions for obtaining that benefit and the conditions for obtaining the legal right to reside in Austria for periods in excess of three months; the granting of a compensatory supplement is made conditional upon the person in question meeting the requirements for obtaining that right of residence. In that regard, it emerges from the explanation provided by the referring court that, according to the *travaux préparatoires* relating to the amendment made with effect from 1 January 2011 to Paragraph 51(1)(2) of the NAG, that provision, by making explicit reference to the compensatory supplement, is now intended to prevent a national of another Member State from being able to obtain the right to reside in Austria by virtue of EU law where that national applies, during his period of residence, for the compensatory supplement.

30 In those circumstances, it appears that the outcome of the dispute in the main proceedings is dependent on knowing whether a Member State may refuse to grant the compensatory supplement to nationals of other Member States on the grounds that – like Mr Brey – they do not, despite having been issued with a certificate of residence, meet the necessary requirements for obtaining the legal right to reside on the territory of that Member State for a period of longer than three months, since, in order to obtain that right, the person concerned must have sufficient resources not to apply for, *inter alia*, the compensatory supplement. The nature of that benefit, which is the subject of the referring court's question, must be examined in the context of analysing this issue.

31 In that regard, it should be borne in mind that, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to determine the case before it. To that end, the Court may have to reformulate the questions referred to it (see, *inter alia*, Case C-45/06 *Campina* [2007] ECR I-2089, paragraph 30, and Case C-243/09 *Fuß* [2010] ECR I-9849, paragraph 39).

32 The question referred should therefore be reformulated to the effect that the referring court seeks, in essence, to ascertain whether EU law – in particular, Directive 2004/38 – should be interpreted as precluding national legislation, such as that at issue in the main proceedings, which does not allow the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since such a right of residence is conditional upon that national having sufficient resources not to apply for the benefit.

*The right of a Union citizen who is not economically active to receive a benefit, such as the benefit at issue in the main proceedings, in the host Member State*

33 As a preliminary point, it should be borne in mind that, in *Skalka*, the Court ruled that the compensatory supplement provided for in Paragraph 292(1) of the ASVG falls within the scope of Regulation No 1408/71 and therefore constitutes a 'special non-contributory benefit' within the

meaning of Article 4(2a) of that regulation, read in conjunction with Annex IIa thereto. Under Article 10a(1) of Regulation No 1408/71, that benefit is to be granted solely by, and at the expense of, the competent institutions of the Member State of residence, in accordance with the legislation of that State.

34 In that regard, the Court found in paragraph 26 of *Skalka* that the Austrian compensatory supplement is classifiable as a 'special benefit' as it augments a retirement pension or an invalidity pension, it is by nature social assistance in so far as it is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, and entitlement is dependent on objective criteria defined by law.

35 In addition, the Court held in paragraphs 29 and 30 of that judgment that the Austrian compensatory supplement has to be regarded as 'non-contributory', given that the costs are borne by a social institution which then receives reimbursement in full from the relevant Land, which in turn receives from the Federal budget the sums necessary to finance the benefit, and that at no time do the contributions of insured persons form part of this financing arrangement.

36 It is common ground that there is nothing in the corresponding provisions of Regulation No 883/2004 – namely, Articles 3(3) and 70 of that regulation and Annex X thereto, concerning 'special non-contributory cash benefits' – to suggest that those findings should be qualified.

37 According to the European Commission, it follows from those provisions that the requirement that, in order to receive the compensatory supplement, the person concerned must have a legal right to reside in the host Member State for a period of longer than three months is not consistent with EU law. Anyone who – like Mr Brey – falls within the scope of Regulation No 883/2004 as a retired person who has ceased all employed or self-employed activity has the right, pursuant to Article 70(4) of that regulation, to be paid special non-contributory cash benefits in his Member State of residence. Under Article 1(j) of that regulation, a person's residence is the place where he 'habitually resides', an expression which refers to the Member State in which the person concerned habitually resides and where the habitual centre of his interests is to be found. It follows, according to the Commission, that the requirement laid down in Paragraph 292(1) of the ASVG, read in conjunction with Paragraph 51(1) of the NAG, for such residence to be lawful represents indirect discrimination contrary to Article 4 of Regulation No 883/2004, since it affects only non-Austrian citizens of the Union.

38 Accordingly, it is first necessary to examine whether a Member State may make the grant of a benefit covered by Regulation No 883/2004 to a national of another Member State conditional upon that national meeting the requirements for obtaining a legal right of residence for a period exceeding three months. Only if the answer to that first question is in the affirmative will it be necessary to determine whether that right of residence can be made conditional upon the person concerned having sufficient resources not to apply for the benefit.

The need to meet the necessary requirements for obtaining a legal right of residence for a period exceeding three months

39 It should be noted that Article 70(4) of Regulation No 883/2004 – upon which the Commission relies – sets out a 'conflict rule', the aim of which is to determine, in cases involving special non-contributory cash benefits, the applicable legislation and the institution responsible for paying the benefits in question.

40 That provision is intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by Regulation No 883/2004 are not left without social security cover because

there is no legislation which is applicable to them (see, by analogy, Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 28, and Case C-619/11 *Dumont de Chassart* [2013] ECR, paragraph 38).

41 On the other hand, that provision is not intended to lay down the conditions creating the right to special non-contributory cash benefits. It is for the legislation of each Member State to lay down those conditions (see, to that effect, *Dumont de Chassart*, paragraph 39 and the case-law cited).

42 It cannot therefore be inferred from Article 70(4) of Regulation No 883/2004, read in conjunction with Article 1(j) thereof, that EU law precludes national legislation, such as that at issue in the main proceedings, under which the right to a special non-contributory cash benefit is conditional upon meeting the necessary requirements for obtaining a legal right of residence in the Member State concerned.

43 Regulation No 883/2004 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes. It thus allows different schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by EU law (Case C-331/06 *Chuck* [2008] ECR I-1957, paragraph 27, and *Dumont de Chassart*, paragraph 40).

44 The Court has consistently held that there is nothing to prevent, in principle, the granting of social security benefits to Union citizens who are not economically active being made conditional upon those citizens meeting the necessary requirements for obtaining a legal right of residence in the host Member State (see, to that effect, Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraphs 61 to 63; Case C-184/99 *Grzelczyk* [2001] ECR I-6193, paragraphs 32 and 33; Case C-456/02 *Trojani* [2004] ECR I-7573, paragraphs 42 and 43; Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 37; and Case C-158/07 *Förster* [2008] ECR I-8507, paragraph 39).

45 However, it is important that the requirements for obtaining that right of residence – such as, in the case before the referring court, the need to have sufficient resources not to apply for the compensatory supplement – are themselves consistent with EU law.

The requirement to have sufficient resources not to apply for the compensatory supplement

46 It should be borne in mind that the right of nationals of one Member State to reside in the territory of another Member State without being engaged in any activity, whether on an employed or a self-employed basis, is not unconditional. Under Article 21(1) TFEU, the right of every citizen of the Union to reside in the territory of the Member States is recognised subject to the limitations and conditions laid down in the Treaty and by the measures adopted for its implementation (see, to that effect, *Trojani*, paragraphs 31 and 32; Case C-200/02 *Zhu and Chen* [2004] ECR I-9925, paragraph 26; and Case C-291/05 *Eind* [2007] ECR I-10719, paragraph 28).

47 By way of such limitations and conditions, Article 7(1)(b) of Directive 2004/38 provides that a Member State may require nationals of another Member State wishing to have the right of residence on its territory for a period of longer than three months without being economically active to have comprehensive sickness insurance cover in the host Member State and sufficient resources for themselves and their family members not to become a burden on the social assistance system of that Member State during their period of residence (see, to that effect, Case C-480/08 *Teixeira* [2010] ECR I-1107, paragraph 42).

48 By contrast with all the governments which have filed written observations, the Commission submits that, since the compensatory supplement is a special non-contributory cash benefit which

falls within the scope of Regulation No 883/2004, it cannot be regarded as 'social assistance' for the purposes of Article 7(1)(b) of Directive 2004/38. Furthermore, according to the Commission, it is clear from the explanatory memorandum for that directive (Proposal for a European Parliament and Council Directive on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States (COM(2001) 257 final)) that the 'social assistance' benefits covered by that provision are those which are not currently covered by Regulation No 883/2004. That interpretation is confirmed, it is claimed, by the fact that, according to that explanatory memorandum, social assistance for the purposes of Directive 2004/38 includes free medical assistance, which is specifically excluded from the scope of Regulation No 883/2004 by virtue of Article 3(5) thereof.

49 In that regard, it should be stressed at the outset that the need for the uniform application of EU law and the principle of equality require that the terms of a provision of EU law which makes no express reference to the law of the Member States for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the European Union, which must take into account the context of that provision and the purpose pursued (see, inter alia, Case C-204/09 *Flachglas Torgau* [2012] ECR, paragraph 37, and Case C-260/11 *Edwards and Pallikaropoulos* [2013] ECR, paragraph 29).

50 As has already been stated in paragraphs 33 to 36 above, a benefit such as the compensatory supplement does indeed fall within the scope of Regulation No 883/2004. However, that fact cannot, in and of itself, be decisive for the purposes of interpreting Directive 2004/38. As all the governments which have filed written observations have submitted, the objectives pursued by Regulation No 883/2004 are different to the objectives pursued by that directive.

51 In that regard, it should be borne in mind that Regulation No 883/2004 seeks to achieve the objective set out in Article 48 TFEU by preventing the possible negative effects that the exercise of the freedom of movement for workers could have on the enjoyment, by workers and their families, of social security benefits (see, to that effect, *Chuck*, paragraph 32).

52 It is in order to achieve that objective that, through the waiver of residence clauses under Article 7 thereof, Regulation No 883/2004 provides, subject to the exceptions set out therein, for the cash benefits falling within its scope to be exportable in the host Member State (see, to that effect, Case C-20/96 *Snares* [1997] ECR I-6057, paragraphs 39 and 40).

53 By contrast, although the aim of Directive 2004/38 is to facilitate and strengthen the exercise of the primary and individual right – conferred directly on all Union citizens by the Treaty – to move and reside freely within the territory of the Member States (see Case C-127/08 *Metock and Others* [2008] ECR I-6241, paragraphs 82 and 59; Case C-162/09 *Lassal* [2010] ECR I-9217, paragraph 30; and Case C-434/09 *McCarthy* [2011] ECR I-3375, paragraph 28), it is also intended, as is apparent from Article 1(a) thereof, to set out the conditions governing the exercise of that right (see, to that effect, *McCarthy*, paragraph 33, and Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035, paragraphs 36 and 40), which include, where residence is desired for a period of longer than three months, the condition laid down in Article 7(1)(b) of the directive that Union citizens who do not or no longer have worker status must have sufficient resources.

54 It is apparent from recital 10 in the preamble to Directive 2004/38, in particular, that that condition is intended, inter alia, to prevent such persons becoming an unreasonable burden on the social assistance system of the host Member State (*Ziolkowski and Szeja*, paragraph 40).

55 That condition is based on the idea that the exercise of the right of residence for citizens of the Union can be subordinated to the legitimate interests of the Member States – in the present

case, the protection of their public finances (see, by analogy, Case C-413/99 *Baumbast and R* [2002] ECR I-7091, paragraph 90; *Zhu and Chen*, paragraph 32; and Case C-408/03 *Commission v Belgium* [2006] ECR I-2647, paragraphs 37 and 41).

56 In a similar vein, Article 24(2) of Directive 2004/38 allows a derogation from the principle of equal treatment enjoyed by Union citizens other than workers, self-employed persons, persons who retain such status and members of their families who reside within the territory of the host Member State, by permitting that State not to confer entitlement to social assistance, in particular for the first three months of residence (see Joined Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585, paragraphs 34 and 35).

57 It follows that, while Regulation No 883/2004 is intended to ensure that Union citizens who have made use of the right to freedom of movement for workers retain the right to certain social security benefits granted by their Member State of origin, Directive 2004/38 allows the host Member State to impose legitimate restrictions in connection with the grant of such benefits to Union citizens who do not or no longer have worker status, so that those citizens do not become an unreasonable burden on the social assistance system of that Member State.

58 In those circumstances, the concept of ‘social assistance system’ as used in Article 7(1)(b) of Directive 2004/38 cannot, contrary to the Commission’s assertions, be confined to those social assistance benefits which, pursuant to Article 3(5)(a) of Regulation No 883/2004, do not fall within the scope of that regulation.

59 As several of the governments which have filed observations have pointed out, the opposite interpretation would lead to unjustifiable differences in treatment between Member States, according to how their national social security systems are organised, given that the ‘special’ nature of a benefit such as the one at issue in the main proceedings – and, as a consequence, the fact that it falls within the scope of Regulation No 883/2004 – depends, inter alia, on whether the grant of that benefit is based, under national law, on objective criteria or solely on the state of need of the person concerned.

60 It follows that, for the purposes of Article 7(1)(b) of Directive 2004/38, the concept of ‘social assistance system’ must be defined by reference to the objective pursued by that provision, as recalled in paragraphs 53 to 57 above, and not by reference to formal criteria (see, to that effect, *Vatsouras and Koupatantze*, paragraphs 41 and 42, and Case C-571/10 *Kamberaj* [2012] ECR, paragraphs 90 to 92).

61 Accordingly, that concept must be interpreted as covering all assistance introduced by the public authorities, whether at national, regional or local level, that can be claimed by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who, by reason of that fact, may become a burden on the public finances of the host Member State during his period of residence which could have consequences for the overall level of assistance which may be granted by that State (see, to that effect, *Bidar*, paragraph 56; *Eind*, paragraph 29; and *Förster*, paragraph 48; see also, by analogy, Case C-578/08 *Chakroun* [2010] ECR I-1839, paragraph 46, and *Kamberaj*, paragraph 91).

62 As regards the compensatory supplement at issue in the main proceedings, it is clear from paragraphs 33 to 36 above that that benefit may be regarded as coming under the ‘social assistance system’ of the Member State concerned. As the Court found in paragraphs 29 and 30 of *Skalka*, that benefit, which is intended to ensure a minimum means of subsistence for its recipient where his pension is insufficient, is funded in full by the public authorities, without any contribution being made by insured persons.

63 Consequently, the fact that a national of another Member State who is not economically active may be eligible, in light of his low pension, to receive that benefit could be an indication that that national does not have sufficient resources to avoid becoming an unreasonable burden on the social assistance system of the host Member State for the purposes of Article 7(1)(b) of Directive 2004/38 (see, to that effect, *Trojani*, paragraphs 35 and 36).

64 However, the competent national authorities cannot draw such conclusions without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned.

65 First, it should be pointed out that there is nothing in Directive 2004/38 to preclude nationals of other Member States from receiving social security benefits in the host Member State (see, by analogy, *Grzelczyk*, paragraph 39).

66 On the contrary, several provisions of that directive specifically state that those nationals may receive such benefits. Thus, as the Commission has rightly pointed out, the very wording of Article 24(2) of that directive shows that it is only during the first three months of residence that, by way of derogation from the principle of equal treatment set out in Article 24(1), the host Member State is not to be under an obligation to confer entitlement to social assistance on Union citizens who do not or no longer have worker status. In addition, Article 14(3) of that directive provides that an expulsion measure is not to be the automatic consequence of recourse to the social assistance system of the host Member State by a Union citizen or a member of his family.

67 Second, it should be noted that the first sentence of Article 8(4) of Directive 2004/38 expressly states that Member States may not lay down a fixed amount which they will regard as 'sufficient resources', but must take into account the personal situation of the person concerned. Moreover, under the second sentence of Article 8(4), the amount ultimately regarded as indicating sufficient resources may not be higher than the threshold below which nationals of the host Member State become eligible for social assistance, or, where that criterion is not applicable, higher than the minimum social security pension paid by the host Member State.

68 It follows that, although Member States may indicate a certain sum as a reference amount, they may not impose a minimum income level below which it will be presumed that the person concerned does not have sufficient resources, irrespective of a specific examination of the situation of each person concerned (see, by analogy, *Chakroun*, paragraph 48).

69 Furthermore, it is clear from recital 16 in the preamble to Directive 2004/38 that, in order to determine whether a person receiving social assistance has become an unreasonable burden on its social assistance system, the host Member State should, before adopting an expulsion measure, examine whether the person concerned is experiencing temporary difficulties and take into account the duration of residence of the person concerned, his personal circumstances, and the amount of aid which has been granted to him.

70 Lastly, it should be borne in mind that, since the right to freedom of movement is – as a fundamental principle of EU law – the general rule, the conditions laid down in Article 7(1)(b) of Directive 2004/38 must be construed narrowly (see, by analogy, *Kamberaj*, paragraph 86, and *Chakroun*, paragraph 43) and in compliance with the limits imposed by EU law and the principle of proportionality (see *Baumbast and R*, paragraph 91; *Zhu and Chen*, paragraph 32; and *Commission v Belgium*, paragraph 39).

71 In addition, the margin for manoeuvre which the Member States are recognised as having

must not be used by them in a manner which would compromise attainment of the objective of Directive 2004/38, which is, inter alia, to facilitate and strengthen the exercise of Union citizens' primary right to move and reside freely within the territory of the Member States, and the practical effectiveness of that directive (see, by analogy, *Chakroun*, paragraphs 43 and 47).

72 By making the right of residence for a period of longer than three months conditional upon the person concerned not becoming an 'unreasonable' burden on the social assistance 'system' of the host Member State, Article 7(1)(b) of Directive 2004/38, interpreted in the light of recital 10 to that directive, means that the competent national authorities have the power to assess, taking into account a range of factors in the light of the principle of proportionality, whether the grant of a social security benefit could place a burden on that Member State's social assistance system as a whole. Directive 2004/38 thus recognises a certain degree of financial solidarity between nationals of a host Member State and nationals of other Member States, particularly if the difficulties which a beneficiary of the right of residence encounters are temporary (see, by analogy, *Grzelczyk*, paragraph 44; *Bidar*, paragraph 56; and *Förster*, paragraph 48).

73 It is true, as the Advocate General states in point 74 of his Opinion, that, unlike most of the other language versions, the German version of Article 7(1)(b) of Directive 2004/38 does not appear to refer to any such 'system'.

74 However, it is settled case-law that the wording used in one language version of a provision of EU law cannot serve as the sole basis for the interpretation of that provision, or be made to override the other language versions in that regard. Such an approach would be incompatible with the requirement of the uniform application of EU law. In the event of divergence between the language versions, the provision in question must be interpreted by reference to the purpose and general scheme of the rules of which it forms a part (see Case C-372/88 *Cricket St Thomas* [1990] ECR I-1345, paragraphs 18 and 19, and Case C-149/97 *Institute of the Motor Industry* [1998] ECR I-7053, paragraph 16).

75 It can be seen from paragraphs 64 to 72 above that the mere fact that a national of a Member State receives social assistance is not sufficient to show that he constitutes an unreasonable burden on the social assistance system of the host Member State.

76 As regards the legislation at issue in the main proceedings, it is clear from the explanation provided by the Austrian Government at the hearing that, although the amount of the compensatory supplement depends on the financial situation of the person concerned as measured against the reference amount fixed for granting that supplement, the mere fact that a national of another Member State who is not economically active has applied for that benefit is sufficient to preclude that national from receiving it, regardless of the duration of residence, the amount of the benefit and the period for which it is available, that is to say, regardless of the burden which that benefit places on the host Member State's social assistance system as a whole.

77 Such a mechanism, whereby nationals of other Member States who are not economically active are automatically barred by the host Member State from receiving a particular social security benefit, even for the period following the first three months of residence referred to in Article 24(2) of Directive 2004/38, does not enable the competent authorities of the host Member State, where the resources of the person concerned fall short of the reference amount for the grant of that benefit, to carry out – in accordance with the requirements under, inter alia, Articles 7(1)(b) and 8(4) of that directive and the principle of proportionality – an overall assessment of the specific burden which granting that benefit would place on the social assistance system as a whole by reference to the personal circumstances characterising the individual situation of the person concerned.

78 In particular, in a case such as that before the referring court, it is important that the competent authorities of the host Member State are able, when examining the application of a Union citizen who is not economically active and is in Mr Brey's position, to take into account, *inter alia*, the following: the amount and the regularity of the income which he receives; the fact that those factors have led those authorities to issue him with a certificate of residence; and the period during which the benefit applied for is likely to be granted to him. In addition, in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, it may be relevant, as the Commission argued at the hearing, to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State.

79 In the present case, it is for the referring court, which alone has jurisdiction to assess the facts, to decide, in light of those elements in particular, whether granting a benefit such as the compensatory supplement to a person in Mr Brey's situation is likely to place an unreasonable burden on the national social assistance system.

80 In the light of all of the foregoing, the answer to the question referred is that EU law – in particular, as it results from Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38 – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the ASVG, to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.

### **Costs**

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

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



EU law – in particular, as it results from Article 7(1)(b), Article 8(4) and Article 24(1) and (2) of Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC – must be interpreted as precluding national legislation, such as that at issue in the main proceedings, which, even as regards the period following the first three months of residence, automatically – whatever the circumstances – bars the grant of a benefit, such as the compensatory supplement provided for in Paragraph 292(1) of the Federal Act on General Social Insurance (Allgemeines Sozialversicherungsgesetz), as amended, from 1 January 2011, by the 2011 Budget Act (Budgetbegleitgesetzes 2011), to a national of another Member State who is not economically active, on the grounds that, despite having been issued with a certificate of residence, he does not meet the necessary requirements for obtaining the legal right to reside on the territory of the first Member State for a period of longer than three months, since obtaining that right of residence is conditional upon that national having sufficient resources not to apply for the benefit.

[Signatures]

1\* Language of the case: German.