

**Case C-240/19**

**Request for a preliminary ruling**

**Date lodged:**

20 March 2019

**Referring court:**

Juzgado Contencioso-Administrativo No 2 de Ourense (Spain)

**Date of the decision to refer:**

26 February 2019

**Applicant:**

FA

**Defendant:**

Tesorería General de la Seguridad Social (TGSS)

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Juzgado Contencioso-Administrativo No 2

**OURENSE**

(Administrative Court No 2, Ourense, Spain)

...[details of the referring court]

**Proceedings:** ORDINARY PROCEEDINGS 0000309 /2017 A /

**Concerning:** STATE ADMINISTRATION

**Brought by:** FA

...

**Against:** TESORERIA GENERAL DE LA SEGURIDAD SOCIAL

...

**ORDER**

Ourense, 26 February 2019.

## FACTS

**FIRST.-** FA lodged an administrative action against the decision of 24 October 2017 of the Ourense Provincial Directorate of the Tesorería General de la Seguridad Social (General Social Security Fund), dismissing the appeal brought against the decision, concerning a Special Agreement, given by the Ourense Provincial Directorate of the Tesorería General de la Seguridad Social on 24 August 2017, which rejected her request that her case be covered by the ordinary special agreement.

After that action was lodged, it was decided that these proceedings would be heard in accordance with the rules on ordinary proceedings; the defendant administrative authority was requested to forward the relevant case-file and notice was given to all parties who might have an interest in the matter.

Following receipt of the administrative case-file, it was decided to notify the applicant so that, within 20 days, she could lodge an application; the applicant duly complied, requesting that the court make an order referring questions to the Court of Justice of the European Union for a preliminary ruling in the terms put forward or in such other terms as the court might consider more [OR 2] appropriate; in the alternative, the applicant requested that the court give judgment recognising in full her right to conclude a standard or ordinary special agreement with the Tesorería General de la Seguridad Social and setting aside the contested administrative act, together with all the favourable legal effects flowing from such recognition.

**SECOND.-** The defendant administrative authority was duly notified of the application and lodged a defence, in which, after setting out the facts and legal arguments that it considered relevant, it submitted that there was no need to seek a preliminary ruling and, accordingly, claimed that judgment should be given dismissing the application and ordering the applicant to pay the costs.

## LAW

### **FIRST.-** *Subject-matter of the dispute*

These proceedings are concerned with establishing whether or not the applicant is entitled to pay voluntary contributions to the Spanish social security system by concluding a (standard or ordinary) Special Agreement with the Tesorería General de la Seguridad Social.

It follows from an examination of the procedural record and the administrative case-file that the applicant, a Portuguese national who is resident in Spain, can show that she paid German social security contributions for a total of 464 months from 3 September 1973 to 31 December 2016.

On 4 July 2017, Ms FA asked to conclude a standard or ordinary special agreement.

By decision of 14 July 2017, the Tesorería General de la Seguridad Social refused to allow the applicant to conclude a special agreement for returning emigrants (which is not what the applicant had requested).

The Tesorería General de la Seguridad Social noticed the error and, when ruling on the appeal, it retrospectively amended the administrative case-file to the time before the decision was given and replaced it with a fresh decision dismissing the request on the grounds that the Community regulations were not applicable, but rather only national law.

**[OR 3]** The decision on the appeal ruled that the refusal was based on the fact that the applicant cannot show that she has paid Spanish social security contributions at any time, and therefore she is not entitled to access voluntary insurance either.

The applicant has contested that decision, requesting that a reference be made for a preliminary ruling; that has been opposed by the defendant.

***SECOND.- National law applicable to the case***

The national law on which the Tesorería General de la Seguridad Social relied to dismiss the applicant's claim is Orden TAS/2865/2003, de 13 de octubre, por la que se regula el convenio especial en el Sistema de la Seguridad Social (Order TAS/2865/2003 of 13 October governing the special agreement within the social security system), Article 2(2)(a) of which provides that: *'The following may conclude a special agreement with the Tesorería General de la Seguridad Social:*

*Workers or those to be treated as such who leave the social security scheme by which they are covered and, at the time of concluding the agreement, are not covered by any other scheme within the social security system'.*

For its part, Article 3(3) of that Order lays down the following conditions for concluding a special agreement with the social security system: *'Having completed, on the date on which the request to conclude the special agreement is made, a period of 180 days of contributions to the social security system in the 12 years immediately before leaving the social security scheme concerned.*

*3.1 For those purposes, account shall be taken of contributions paid to any of the social security system schemes, including those corresponding to quota days in respect of bonuses, contributions which may have been paid as a result of another special agreement to cover the same financial benefits, contributions relating to days which are regarded as a period of actual contribution during the first year of a career break or shorter period, in accordance with the applicable legislation, on the grounds of caring for each child or family member up to second-degree relatives as a result of age, accident or sickness, and, as appropriate, days for which contributions have been paid during periods of*

*receipt of unemployment benefits or allowances and also periods in which contributions were paid in one of the other Member States of the European Economic Area or States with which there is an international agreement on the matter, unless otherwise provided for by the special [OR 4] provision or international agreement, provided that they do not overlap with one another and they precede the date on which the special agreement whose conclusion is sought takes effect.'*

### **THIRD.- EU law**

The relevant EU law consists of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

Article 2(1) of that regulation provides: *'This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.'*

In addition, and in order to overcome any inconsistencies in this area resulting from different national laws, Article 5 states: *'Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:*

*(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.'*

For its part, Article [6] provides: *'Unless otherwise provided for by this Regulation, the competent institution of a Member State whose legislation makes:*

- the acquisition, retention, duration or recovery of the right to benefits,*
- the coverage by legislation, or*
- the access to or the exemption from compulsory, optional continued or voluntary insurance,*

*conditional upon the completion of periods of insurance, employment, self-employment or residence shall, to the extent necessary, take into account periods of insurance, employment, self-employment or residence completed under the legislation of any other Member State as though they were periods completed under the legislation which it applies.'*

Lastly, as regards the requirement to have previously been subject to the Spanish legislation, Article 14(4) of the regulation provides: *'Where the legislation of a*

*Member State makes admission to voluntary insurance or [OR 5] optional continued insurance conditional upon residence in that Member State or upon previous activity as an employed or self-employed person, Article 5(b) shall apply only to persons who have been subject, at some earlier stage, to the legislation of that Member State on the basis of an activity as an employed or self-employed person.'*

#### **FOURTH.- *The parties' positions***

The applicant's position is that she has complied with the Community and Spanish legislation in relation to the requirements laid down in the latter for concluding a special agreement, and, in support of that position, she submits that, for the purposes of the Community regulation, it is sufficient that she left the social security scheme of a Member State, in this case Germany, where she can show that she paid contributions in respect of more than 1 080 days in the 12 preceding years.

Accordingly, the applicant submits that she should not be required to have previously paid contributions to the Spanish social security scheme or to have left that scheme, since that runs counter to the Community coordinating legislation which seeks to overcome differences between the different national rules by making the place where contributions were paid immaterial for the purposes of concluding a national agreement.

Moreover, the balance of the Spanish social security system would not be upset because the Spanish State would only have to pay the share proportionate to the contributions paid to its scheme and not those paid by the applicant in Germany.

The defendant counters that it cannot agree to the request made ...because it has not been established that contributions were paid to the Spanish social security system for a period of 1 080 days (either in total or by supplementing that period with the contributions paid to the German social security system) in the last 12 years immediately before the applicant left the social security scheme.

The defendant submits that that condition for access to the ordinary special agreement is mandatory under the Spanish legislation, since it is a concept created exclusively to provide continuity of cover under the Spanish social security system but not under the German social security system.

[OR 6] The Tesorería General de la Seguridad Social submits that that would entail treating someone who has not contributed to supporting the Spanish social security system in the same way as someone who has done so, with the potential expenditure which could be incurred as a result by the respective social security systems, especially in countries where there may be greater migration.

**FIFTH.** - *Reasons for making a reference for a preliminary ruling*

The issue in these proceedings is to determine whether it is lawful for the administrative authority's decision to reject the applicant's request to pay voluntary contributions to the social security system because she has not shown that she paid contributions to the Spanish social security system for a period of 1 080 days (either in total or by supplementing that period with the contributions paid to the German social security system) in the last 12 years immediately before leaving the social security scheme.

The issue is highly significant in countries like Spain and Portugal which, in the 1960s and 1970s suffered high levels of migration to central Europe, while, in recent years, many individuals have decided to return to their countries of origin to spend their final years there; therefore, there may be numerous similar cases.

Accordingly, the question arises of whether a period during which contributions were paid to another social security system should be taken into account and whether, as a fiction, that period should be treated as though it occurred in Spain, for the sole purpose of enabling access to voluntary insurance or optional continued insurance.

Therefore, there is a need to clarify whether, as a condition of eligibility for voluntary insurance or optional continued insurance ..., a national of an EU Member State can be required to have left the social security scheme of the country in which he or she seeks to access that insurance, in this case Spain, and whether it is necessary for the applicant to have been subject to the Spanish legislation at some stage prior to the application or whether it is sufficient that he or she has been subject to the legislation of another Member State.

**OPERATIVE PART**

**[OR 7] First.**- The proceedings are stayed pending a preliminary ruling.

**Second.**- The following questions are referred to the Court of Justice for a preliminary ruling under Article 234 of the EC Treaty:

- (a) Where a national provision, such as Article 2(2)(a) of Order TAS 2865/2003, requires that a person must have left a social security scheme in order to be eligible for voluntary insurance or optional continued insurance, must the person concerned have left a Spanish social security scheme or, on the other hand, in accordance with the principle of equal treatment of facts laid down in Article 5(b) of Regulation No 883/2004, must the Spanish competent institution take account of the fact that the person concerned has left a similar social security scheme of another Member State, as though that had occurred in Spain?
- (b) Where a national provision, such as Article 3(3) of Order TAS 2865/2003, requires evidence of contribution periods as a condition of eligibility for

voluntary insurance or optional continued insurance, is it necessary for the person concerned to have been subject to the Spanish legislation at some earlier stage or, in accordance with Article 6 of Regulation No 883/2004, must the competent Spanish institution take account of contribution periods completed under the legislation of another Member State, as though those contribution periods were completed in Spain?

This order is to be served on the parties, who must be informed that it cannot be the subject of an appeal.

...

Decided, ordered and signed ...by the judge of Juzgado de lo Contencioso-administrativo No 2 de Ourense (Administrative Court No 2, Ourense, Spain).

**[OR 8]** ...

**[OR 9]** ...[correction of errors relating to the date of the order]

WORKING DOCUMENT