

Anonymised version

Translation

C-168/19 — 1

Case C-168/19

Request for a preliminary ruling

Date lodged:

25 February 2019

Referring court:

Corte dei Conti — Sezione Giurisdizionale per la Regione Puglia
(Italy)

Date of the decision to refer:

10 July 2018

Applicant:

HB

Defendant:

Istituto Nazionale della Previdenza Sociale

ITALIAN REPUBLIC

LA CORTE DEI CONTI (COURT OF AUDITORS)

Ord. 125/2018

Judicial Division for the Region of Apulia

[...],

has made the following

ORDER

in the proceedings [...] brought by **HB** [...] against the **Istituto Nazionale della Previdenza Sociale (I.N.P.D.A.P.)**, [...].

1. MAIN PROCEEDINGS

By application notified to the Istituto Nazionale della Previdenza Sociale (National Social Welfare Institute) on 21 July 2017, Mr HB brought proceedings against that institute in which he sought a declaration that he was entitled to payment of his pension in Portugal before deduction of Italian taxes.

The applicant, who is the beneficiary of a pension previously administered by the Istituto Nazionale di Previdenza e Assistenza per i dipendenti dell'Amministrazione Pubblica (National Social Welfare Institute for Public Officials) (I.N.P.D.A.P.), with registration No 17130153, the award of which started as from 1 August 2007, transferred his residence to Portugal and informed the Istituto Nazionale della Previdenza Sociale, by registered letter of 16 December 2015, of his wish to receive his pension on a monthly basis without any deduction of Italian taxes, pursuant to Articles 18 and 19(2) of L. 10 luglio 1982, n.562 (Law No 562 of 10 July 1982) which ratified the Convention between the Italian Republic and the Republic of Portugal on the avoidance of double taxation and the prevention of tax evasion in the field of income tax.

The Istituto Nazionale della Previdenza Sociale refused the applicant's request and, by a decision dated 23 December 2015, stated that pensioners in receipt of an Italian public sector pension 'are excluded from the possibility of benefiting from tax advantages in Portugal by Article 19 of the Convention itself. Exemption from tax is available to all Italian pensioners in receipt of a private sector pension.'

The Istituto Nazionale della Previdenza Sociale entered an appearance on 7 April 2017 by filing a defence, accompanied by an administrative report, in which the merits of the application of the applicant are disputed, on the ground that 'whereas for pensioners who are former private sector employees [Or. 2] the only requirement for the award of a pension before deduction is residence, pensioners who are former public sector employees may obtain exemption from Italian taxes only if they acquire the nationality of another country'.

2. NATIONAL LAW

The legal provisions which are applicable in the present case are the following.

- Law No 562 of 10 July 1982 (*Gazzetta Ufficiale Serie Generale (Official Journal, General Series) No 224 of 16 August 1982*)

ARTICLE 18 (Pensions)

Subject to Article 19(2), pensions and other similar remuneration paid to a resident of a contracting State in consideration of past employment shall be taxable only in that State.

Article 19 (Public sector)

2. (a) The pensions paid by a contracting State, by one of the political or administrative subdivisions of that State or by one of its local authorities, whether directly or from funds set up by them, to a natural person in respect of services provided to that State or local authority, shall be taxable in that State only.

3. SUCCINCT PRESENTATION OF THE GROUNDS FOR THE REQUEST FOR A PRELIMINARY RULING

The facts relevant to the adjudication of the case before the court in the main proceedings come within the scope of EU law because, even though direct taxation falls within their competence, the Member States must exercise that competence in a manner consistent with EU law, as already stated by the Court of Justice of the European Union (see, most recently, the judgment of 19 November 2015, *Hirvonen*, C-632/13, EU:C:2015:765, paragraph 28 and the case-law cited).

The fiscal competence of the Member States in the field of direct taxation — even though that competence is the expression of national sovereignty and does not come within the exclusive competence of the [European Union] — must be exercised in compliance with the fundamental freedoms laid down by the Treaty, on which [Or. 3] the establishment and functioning of the internal market are based. This implies the existence of a potential link between any national tax law and any directly applicable provision of the Treaty, resulting in a general limitation on the fiscal sovereignty of individual Member States in the field of direct taxation and, in particular, compliance with Article 21 TFEU, which is the provision of the FEU Treaty to which reference should be made in the present case.

The EU Court of Justice has stated (judgment of 19 November 2015, *Hirvonen*, C-632/13, EU:C:2015:765) that pensioners who leave the Member State in which they have spent all their working life in order to reside in another Member State may, in cases where their situation is not covered by the freedom of movement guaranteed by Article 45 TFEU, invoke the right to free movement as a citizen of the European Union under Article 21 TFEU (see, to that effect, judgment of 9 November 2006, *Turpeinen*, C-520/04, EU:C:2006:703, paragraphs 16 to 23).

It is clear that the Italian legislation at issue in the main proceedings introduces inequality of treatment between, on the one hand, Italian pensioners in receipt of a private sector pension who are resident in Portugal and, on the other, Italian pensioners in receipt of a public sector pension who are also resident in Portugal, resulting in differing tax treatment which is more advantageous for the former

group of Italian pensioners and less advantageous for the latter group; such treatment amounts to an obstacle to free movement within the European Union.

The Court of Justice of the European Union (judgment of 9 November 2006, *Turpeinen*, C-520/04, EU:C:2006:703) has held that ‘[n]ational legislation which places some of its nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State would give rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen’s freedom to move’ (paragraph 22). The disadvantage is, in the present case, only indirect, in that it relates to different tax treatment of the pensions of former private sector employees in comparison with those of former public sector employees.

Moreover, the differing tax treatment of the pensions of Italian citizens who transfer their residence to Portugal, depending on whether they are former public sector employees or former private sector employees, amounts to discrimination on grounds of nationality, which is prohibited by Article 18 TFEU, in that former private sector employees are merely required to be resident there, whereas former public sector employees must have acquired Portuguese nationality.

In general terms, the principle of non-discrimination requires that comparable situations should not be treated differently and that different situations should not be treated in the same way unless such treatment is objectively justified.

The Court of Justice has made it clear that the principle of equal treatment prohibits not only direct or overt discrimination but also indirect **[Or. 4]** or covert discrimination which, although based on different distinguishing criteria, leads in fact to the same result.

The question to be referred to the Court of Justice for a preliminary ruling can therefore be worded as follows: ‘Must Articles 18 TFEU and 21 TFEU be interpreted as precluding legislation of a Member State which provides for the taxation, in that Member State, of the income of a person resident in another Member State who receives all of his income from the first Member State but who does not hold the nationality of the second Member State, without the benefit of the tax advantages provided by that second Member State?’

ON THOSE GROUNDS

[...]

The present proceedings are stayed until the Court of Justice of the European Union has given a ruling.

[...] Bari [...] 10 July 2018 [...]

[...]