

Case C-302/19**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:**

11 April 2019

Referring court:

Corte suprema di cassazione (Supreme Court of Cassation, Italy)

Date of the decision to refer:

5 February 2019

Appellant:

Istituto Nazionale della Previdenza Sociale

Respondent and cross-appellant:

WS

Subject of the action in the main proceedings

Appeal in cassation seeking to set aside an appeal judgment establishing that a law is discriminatory on the basis of nationality where that law does not include in the family unit, for the purposes of calculating the family unit allowance, the family members of a third-country national with a single permit to reside and work under Directive 2011/98/EU who live in that third country, while it does include the non-resident family members of a national of the Member State.

Subject-matter and legal basis of the reference

Interpretation of Article 12(1)(e) of Directive 2011/98/EU and of the principle of equal treatment under Article 267 TFEU.

Question referred

Should Article 12(1)(e) of Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 and the principle of equal treatment for

holders of single permits to reside and work and national citizens be interpreted to the effect that they preclude national legislation under which, unlike the provisions laid down for nationals of the Member State, the family members of a worker with a single permit from a third country are excluded when determining the members of the family unit, for the purpose of calculating the family unit allowance, where those family members live in the third country of origin?

Provisions of EU law and case-law relied on

Directive 2011/98/EU of the European Parliament and of the Council of 13 December 2011 on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State and on a common set of rights for third-country workers legally residing in a Member State (OJ 2011 L 343, p. 1): Article 12(1)(e), under which third-country workers shall enjoy equal treatment with nationals of the Member State in which they live with regard to, inter alia, the branches of social security defined in Regulation (EC) No 883/2004, and recitals 2, 19, 20, 24 and 26

Judgment of the Court of Justice of 21 June 2017, *Martinez Silva* (C-449/16, EU:C:2017:485)

Provisions of national law relied on

Decreto legge 13 marzo 1988, n. 69, ‘Norme in materia previdenziale, per il miglioramento delle gestioni degli enti portuali ed altre disposizioni urgenti’ (Decree-Law No 69 of 13 March 1988, ‘Provisions governing social security, for improvement of the management of port bodies and other urgent provisions’), converted into Law No 153 of 13 May 1988) (GURI No 143 of 20 June 1988), Article 2(1): ‘For employees and beneficiaries of pensions and financial welfare benefits resulting from employment ..., Government employees ..., from the current pay period as at 1 January 1988, family allowances ... shall be replaced by the family unit allowance, where the conditions laid down in this article are met. 2. The allowance shall be payable at different rates based on the number of family members and the income of the family unit, according to the table attached to this decree. The income levels stated in that table shall be increased ... for family units that include individuals who, because of disability or mental or physical impairment, are completely and permanently unable to hold down a paying job, or, if minors, experience persistent difficulties in performing the tasks and functions consistent with their age. Those income levels shall be increased ... if the individuals described in paragraph 1 are widows or widowers, divorced, legally separated or unmarried. With effect from 1 July 1994, where the family unit described in paragraph 6 includes two or more children, the monthly amount of the allowance payable shall be increased ... for each child, excluding the first ... 6. The family unit shall be made up of the spouses, excluding those legally and effectively separated, and children and equivalents ... aged less than 18 years or regardless of age where, because of disability or mental or physical impairment,

they are completely and permanently unable to hold down a paying job ... 6-bis. A family unit as described in paragraph 6 shall not include spouses and children and equivalents of foreign nationals that are not resident in the territory of the Republic, except where the State of which that foreign national is a citizen is subject to reciprocity with Italian citizens or where an international convention on family allowances has been concluded. The States to which the principle of reciprocity applies shall be determined by the Minister of Labour and Social Security, following consultation with the Minister of Foreign Affairs ... 8-bis. Only one allowance may be granted for a given family unit. With regard to the members of the family unit to whom the allowance is paid, that allowance is not compatible with any other benefit or family allowance to which they may be entitled. 9. The income of the family unit shall be made up of the amount of total income, subject to personal income tax, earned by the members of the family unit in the calendar year before 1 July of each year and shall apply for payment of the allowance up to 30 June of the following year. ... Income of any nature shall also be counted as income ... if more than ... Income shall not include severance indemnities, howsoever named, and advance payments of such indemnities, or the allowance described in this article ...'

Decreto legislativo 4 marzo 2014, n. 40, 'Attuazione della direttiva 2011/98/UE ...' (Legislative Decree No 40 of 4 March 2014, 'Implementation of Directive 2011/98/EU ...') (OJ No 68 of 22 March 2014)

Succinct presentation of the facts and the main proceedings

- 1 Mr WS, a Sri Lankan national, held a permit to carry out paid employment from 9 December 2011 and a single work permit from 28 December 2015 under Legislative Decree No 40/2014. From January to June 2014 and then from July 2014 to June 2016, his family (wife and two children) left Italy to return to their country of origin (Sri Lanka). In relation to these periods of time, Mr WS was refused the family unit allowance by the Istituto Nazionale della Previdenza Sociale (the Italian social security agency, 'the INPS') on the basis that, for foreign nationals, Article 2(6-bis) of Decree-Law No 69/88 excludes the spouse and children of a worker who are not resident in Italy from calculation of the allowance.
- 2 While the Tribunale di Alessandria (Court of Alessandria, Italy) rejected Mr WS's legal action against that refusal decision, the Corte d'appello di Torino (Turin Court of Appeal, Italy) held, on the basis of Article 12 of Directive 2011/98/EU, which has not yet been transposed into Italian law but is directly applicable, that Article 2(6-bis) was discriminatory and disapplied it.
- 3 The INPS has appealed in cassation to have the appeal judgment set aside.

The essential arguments of the appellant in the main proceedings

- 4 According to the INPS, contrary to what the court held in the judgment under appeal, Directive 2011/98/EU should also be interpreted on the basis of recitals 8, 19, 20, 24 and 26, which point to the different position of holders of single permits to live and work as compared to holders of residence permits under Directive 2003/109/EC, the absence of common European legislation in the countries of the EU in relation to those rights for which third-country nationals are guaranteed equal treatment, the aim of not granting rights in relation to situations which lie outside the scope of Union law, such as in relation to family members residing in a third country, and the discretion granted to each Member State to limit the conditions under which social security benefits are granted to third-country nationals, as well as the amount of such benefits and the period for which they are granted. The family unit allowance at issue in this case is welfare-related and not assistance-related, unlike the benefit that the Court of Justice held to be applicable to foreign nationals in the *Martinez Silva* case.

Succinct presentation of the reasons for the request for a preliminary ruling

- 5 The family unit allowance provided for under Article 2 of Decree-Law No 69/1988 is a financial supplement payable to all employees, pensioners or recipients of social security benefits resulting from employment, provided that their family unit earns income below a certain threshold.
- 6 The amount of that allowance, which is payable by the INPS, is quantified according to the number of family unit members, the number of children and the income of the family unit. The contribution is paid by the employer with the remuneration payment, on the basis of a percentage rate applied to the employee's gross remuneration. The INPS then makes a final adjustment between the amounts paid by the employer and the social security contributions it owes.
- 7 The Italian case-law has defined the nature of the allowance at times as *welfare-related*, because it is a supplement, to either pension or remuneration, tied to the recipient's job and funded by the contributions paid by all employers, in order to guarantee sufficient income for families that generally lack such an income, and at other times as *assistance-related*, given that both the amount of the allowance and the income taken as the parameter for its payment are higher for those families who deserve greater protection because they include members with disabilities or minors experiencing difficulties.

However, that distinction does not seem relevant to the referring court, which, in any case, takes the view that this is a measure falling within the scope of Article 12(1)(e) of Directive 2011/98/EU.

- 8 Since the law attributes essential importance to the members of the family unit in the structure of the allowance and identifies them as the substantial beneficiaries of the financial benefit that the recipient of the remuneration or pension is entitled

to receive, there are some doubts on its interpretation that justify the request for a preliminary ruling: whether the family members of a foreign national, and not those of an Italian national, can be excluded from a family unit when their actual place of residence can no longer be said to be in Italy and there are no conditions of reciprocity with their country of citizenship, also considering the objectives set out in recital 20 of Directive 2011/98/EU: ‘... The right to equal treatment in the fields specified by this Directive should be granted ... including family members of a third-country worker who are admitted to the Member State in accordance with Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification’ and in recital 24: ‘Third-country workers should enjoy equal treatment as regards social security ... This Directive, furthermore, should not grant rights in relation to situations which lie outside the scope of Union law, such as in relation to family members residing in a third country. This Directive should grant rights only in relation to family members who join third-country workers to reside in a Member State on the basis of family reunification or family members who already reside legally in that Member State.’

- 9 The Court of Justice has so far only ruled on cases in which the recipients of the rights to social protection claimed and their entire family unit resided permanently in the Member State or were transferred from one Member State to another. The question referred is therefore unprecedented.

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