

**Case C-303/19****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:**

VR

**Subject of the action in the main proceedings**

Request 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 residence permit under Directive 2003/109/EC 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 11(1)(d) of Directive 2003/109/EC and of the principle of equal treatment under Article 267 TFEU.

**Question referred**

Should Article 11(1)(d) of Council Directive 2003/109/EC of 25 November 2003 and the principle of equal treatment for long-term residents 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 who is a long-term resident and a citizen of a third country are excluded when determining the members of the family unit, for the purpose of calculating the family unit allowance, where those individuals live in the third country of origin?

### **Provisions of EU law and case-law relied on**

Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44), Articles 2 and 11(1), (2) and (4), and recitals 12, 13 and 14

Judgment of the Court of Justice of 2 September 2015, *Commission v Netherlands* (C-508/10, EU:C:2012:243) and of 24 April 2012, *Kamberaj* (C-571/10, EU:C:2012:233)

### **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 8 gennaio 2007, n. 3, 'Attuazione della direttiva 2003/109/CE ...' (Legislative decree No 3 of 8 January 2007, 'Implementation of Directive 2003/109/EC ...' (GURI No 24 of 30 January 2007), which incorporates the provisions of the directive into the text of decreto legislativo 25 luglio 1998, n. 286, 'Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero' (Legislative Decree No 286 of 25 July 1998, 'Consolidated text of the provisions governing immigration and the status of aliens' (Ordinary Supplement to the GURI No 191 of 18 August 1998), which now states as follows in Article 9(1): 'A foreign national who, for at least five years, has held a valid residence permit, who shows that he has an income of not less than the annual amount of social benefits and, where the application relates to members of his family, a sufficient income ... and appropriate accommodation satisfying the minimum conditions laid down by the relevant provisions of national law, may apply to the Questore (Chief of Police) for a long-term resident's E[U] residence permit for himself and his family members ...'; and in Article 9(12): 'In addition to the provisions laid down with respect to foreign nationals lawfully residing in Italy, the holder of a long-term EU residence permit may: ... (c) be entitled to social assistance and social security benefits and to those relating to subsidies for health, education and social matters, and those relating to access to goods and services made available to the public, including access to the procedure for obtaining accommodation managed by the public authorities, unless otherwise provided and on condition that it is shown that the foreign national actually resides in national territory ...'

### **Succinct presentation of the facts and the main proceedings**

- 1 Mr VR is a Pakistani national employed in Italy, whose family members left Italy to return to their country of origin between September 2011 and April 2014. In relation to that period of time, Mr VR was refused the family unit allowance by his employer and 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 On the basis of Article 11 of Directive 2003/109/EC and the corresponding provisions for its implementation into the Italian legal framework, first the Tribunale di Brescia (Court of Brescia, Italy) and then the Corte di appello di Brescia (Brescia Court of Appeal, Italy) held that Article 2(6-bis) is discriminatory and disapplied it, ordering the INPS and the employer to return the sums deducted to the employee.
- 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, the family unit allowance is not assistance-related, as would be required under Article 11(1) of Directive 2003/109/EC, which requires equal treatment in relation to social security, social assistance and social protection as defined by national law, but rather welfare-related, and is not 'essential' under recital 13, and it can therefore fall within the exemption to the rule on equal treatment for citizens and foreign nationals laid down in paragraph 4 of that article.

### **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 11(1)(d) of Directive 2003/109/EC.

- 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, taking into account that recital 4 and Article 2(1) of Directive 2003/109/EC state that the objective of that directive is ‘the integration of third-country nationals who are long-term residents in the Member States’ and define family members as ‘third-country nationals who reside in the Member State concerned’, respectively?
- 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.

WORKING DOCUMENT