Case C-163/20

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:

16 April 2020

Referring court:

Bundesfinanzgericht (Austria)

Date of the decision to refer:

16 April 2020

Appellant:

AZ

Respondent authority:

Finanzamt Hollabrunn Korneuburg Tulln

Subject matter of the main proceedings

Appeal against a decision rejecting the application of a worker resident in the Czech Republic and working in Austria to be granted family allowances in the amount payable to workers resident in Austria

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Question referred

Are Articles 18 and 45(1) of the Treaty on the Functioning of the European Union, Article 7(1) and (2) of Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Article 4, Article 5(b), Article 7 and Article 67 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 and the second

sentence of Article 60(1) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems to be interpreted as precluding the application of national legislation which provides that family benefits for a child who is not actually permanently resident in the Member State that pays those family benefits, but is actually resident in another Member State of the European Union, in another contracting party to the Agreement on the European Economic Area or in Switzerland, must be adjusted on the basis of the comparative price levels, published by the Statistical Office of the European Union, for the State concerned in relation to the Member State that pays the family benefits?

Provisions of EU law cited

Treaty on the Functioning of the European Union (TFEU), Articles 18 and 45

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, recital 16, Articles 1, 3, 4, 5, 7, 67, 68(2)

Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems, Article 60(1)

Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union, Article 7(1) and (2)

Provisions of national law cited

Familienlastenausgleichsgesetz 1967 (Law on compensation for family expenses 1967, 'FLAG 1967'), Paragraphs 1, 2, 5, 8, 8a, 11, points 2, 53, 55 of Paragraph 33(3)

Einkommensteuergesetz 1988 (Law on income tax 1988, 'EStG 1988'), Paragraph 33(3)

Verordnung der Bundesministerin für Frauen, Familien und Jugend und des Bundesministers für Finanzen über die Anpassung der Familienbeihilfe und des Kinderabsetzbetrages in Bezug auf Kinder, die sich ständig in einem anderen Mitgliedstaat der EU oder einer Vertragspartei des Europäischen Wirtschaftsraumes oder der Schweiz aufhalten (Order of the Federal Minister for Women's Affairs, Family and Youth and the Federal Minister of Finance adapting the family allowance and tax credits in relation to children permanently residing in another Member State of the EU or a contracting party to the European Economic

Area or Switzerland, 'Order adapting family allowance and tax credits for the EU'), Federal Law Gazette II No 318/2018; Paragraphs 1 to 5

Brief summary of the facts and procedure

The appellant and her husband live together with their two minor children in the Czech Republic. She is a cross-border commuter employed in Austria, and her husband works in the Czech Republic. Since 2016, Finanzamt Hollabrunn Korneuburg Tulln (Hollabrunn Korneuburg Tulln Tax Office) has made a differential payment (payment supplementing the difference or supplementary allowance) to the appellant pursuant to Regulation No 883/2004 in the amount of the difference between the entitlement to family benefits in the Czech Republic and that in Austria. The total amount of this differential payment paid out up until December 2018 was EUR 374.80 (consisting of EUR 238.00 for the family allowance and EUR 116.80 for the tax credits for the two children). Pursuant to the provisions of Paragraph 8a FLAG 1967 and point 2 of Paragraph 33(3) EStG 1988, which entered into force on 1 January 2019, the payment was adjusted to the value given by the comparative price level published by the Statistical Office of the European Union in relation to the ratio of purchasing power in the Czech Republic to that in Austria as at the reference date of 1 June 2018. This resulted in a total monthly amount of EUR 232.00 (consisting of EUR 159.70 for the family allowance and EUR 72.30 for the tax credits for the two children).

As the appellant did not agree with the reduction, she requested the 'full, non-indexed supplementary payment for the family allowances' from Hollabrunn Korneuburg Tulln Tax Office. The Tax Office refused this request and, after preliminary appeal proceedings in which the Tax Office did not address the concerns expressed by the appellant from an EU-law perspective, submitted the appeal to the Bundesfinanzgericht (Federal Finance Court) for a decision. A large number of similar proceedings are pending before the Federal Finance Court.

Principal arguments of the parties to the main proceedings

It is disputed whether, as the assessment basis for the granting of that differential amount, Austrian family benefits (family allowance and the tax credits to be paid together with it) should be set at the level at which they have been paid since 2019 for children actually living in Austria, or whether that level should be adjusted to the price level in the Czech Republic. The appellant takes the view that 'mobile workers have the same entitlement to family benefits as local workers, irrespective of the place of residence of the children concerned'. The Tax Office opposes this view.

Brief summary of the basis for the reference

The contested decision was issued after a discussion about whether the indexation of family benefits that are covered by the coordination rules of EU law was compatible with EU law. In November 2016, the Commission did not comply with a request from several Austrian federal ministries to take up the issue of indexation of family benefits (to be exported) and to submit a proposal to amend the rules on the coordination of social security systems.

On 5 January 2018, making reference to a legal opinion of a professor of labour and social law at the University of Vienna, the former Federal Ministry for Family Affairs and Youth — in coordination with the Federal Ministry of Finance — submitted a ministerial draft concerning a Federal law amending FLAG 1967 and EStG 1988 for consideration. On 2 May 2018, the former Federal Government introduced a Government bill, which was essentially identical to the ministerial draft as regards the proposed indexation. On 24 October 2018, the Government bill was passed by a majority in the National Council. The indexation entered into force for family benefits payable from 1 January 2019.

On 24 January 2019, the Commission initiated infringement proceedings against Austria. These are currently in the second stage. In its reasoned opinion of 25 July 2019, the Commission took the view that the Austrian indexation mechanism was discriminatory as it led to a reduction of the family benefits and tax reductions granted to workers in Austria only because their children happened to reside in another Member State. The fact that a Member State had a lower cost of living than Austria was of no relevance for benefits paid out as a lump sum and not linked to the actual expenses for maintaining a child. As far as can be seen, the Commission has not yet brought the matter before the Court of Justice.

Most — but not all — authors in the legal literature express the view that the indexation of exported family benefits is not compatible with EU law. The correct application of EU law is not so obvious as to leave no scope for any reasonable doubt.

Entitlement to the payment supplementing the difference between the Czech and Austrian family benefits

In accordance with Article 68(1)(b) of Regulation No 883/2004, where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State on the same basis, the priority of rights available on the basis of an activity as an employed or self-employed person is given to the legislation of the children's Member State of residence. Pursuant to paragraph 2 of that article, in the case of overlapping entitlements, family benefits are provided in accordance with the legislation designated as having priority, entitlements to family benefits under other legislation being suspended up to the amount provided for in the first legislation and a differential supplement being provided, if necessary, for the sum exceeding that amount (see judgment of the

Court of 18 September 2019, C-32/18, *Moser*, ECLI:EU:C:2019:752, paragraph 41, and also in that connection, judgment of the Court of 30 April 2014, C-250/13, *Wagener*, C-250/13, EU:C:2014:278, paragraph 46).

It is common ground that Austria pays family benefits to the appellant to the extent that they exceed the Czech family benefits.

The family allowance and tax credits may be regarded as a social security benefit, as they are granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and relate to one of the risks expressly listed in Article 3(1) of Regulation No 883/2004 (item (j), family benefits) (see judgment of the Court of 18 December 2019, C-447/18, *UB*, ECLI:EU:C:2019:1098).

According to the Court's settled case-law, Member States have the power to organise their own social security schemes, but, in doing so, they must comply with EU law and, in particular, the provisions of the FEU Treaty giving every citizen of the European Union the right to move and reside within the territory of the Member States (see judgment of the Court of 23 January 2020, C-29/19, *ZP*, ECLI:EU:C:2020:36, paragraphs 39 and 41, with further references).

The national legislation applied by the Tax Office is in particular at risk of clashing with Article 18 and Article 45(1) TFEU, as regards primary law, and Article 7(1) and (2) of Regulation No 492/2011, Articles 4, 5, 7 and 67 of Regulation No 883/2004 and the second sentence of Article 60(1) of Regulation No 987/2009, as regards secondary law.

In this connection, the referring court refers in particular to the judgments of 15 January 1986, 41/84, *Pinna*, ECLI:EU:C:1986:1, of 6 October 1995, C-321/93, *Martinez*, ECLI:EU:C:1995:306, paragraph 21, of 7 November 2002, C-333/00, *Maaheimo*, EU:C:2002:641, paragraph 32, of 22 October 2015, C-378/14, *Trapkowski*, EU:C:2015:720, paragraph 35, of 12 March 2020, C-769/18, *SJ*, ECLI EU:C:2020:203, paragraph 43, of 2 April 2020, C-802/18, *FV and GW*, ECLI:EU:C:2020:269, paragraph 24 and of 18 September 2019, C-32/18, *Moser*, ECLI EU:C:2019:752, paragraph 38.

Both overt and covert forms of discrimination are prohibited under primary law. In this respect, it was stated in the parliamentary debate which led to the decision on indexation that the basis was not nationality, but rather account was taken of the place of residence, and that, also for children of Austrian nationality living in another Member State, indexing was carried out accordingly on the basis of the actual cost of living. It was also pointed out that, as part of the early attempts to prevent the United Kingdom from leaving the EU, the Commission had drawn up a proposal providing for the indexation of family benefits. The Commission indexed the salaries of its officials who did not live in Brussels or Luxembourg, as well as the family benefits for their children (see Regulation No 1296/2009).

In common parlance, Articles 5(b) and 67 of Regulation No 883/2004 would have to be interpreted as meaning that the effect of the deeming provisions set out therein in the present case was that, for the purposes of the equality provided for in that regulation, the appellant's children were to be legally regarded as being resident in Austria, even if they actually lived in the Czech Republic, and the differential supplement under Article 68(2) of Regulation No 883/2004 would therefore have to be paid without regard to the indexation prescribed by national provisions. Assuming that the family members were resident in Austria, there would also be an entitlement to family allowance in the same amount as that paid for children residing in Austria.

Such an interpretation was also supported by the fact that the Austrian legislature essentially transferred the statement of the first sentence of Article 67 of Regulation No 883/2004 into national law in the second sentence of Paragraph 53(1) FLAG 1967, but expressly provided in Paragraph 53(4) FLAG 1967 that the second sentence of Paragraph 53(1) FLAG 1967 was not applicable in relation to the indexation rule in Paragraph 8a(1) to (3) FLAG 1967, that is to say the Austrian legislature took the view that the application of the indexation clearly conflicted with the deeming provision stipulating residence in the State paying the benefit.

Different housing, education and maintenance needs depending on the country of residence were deliberately removed by the deeming provision stipulating residence. Irrespective of the child's place of residence, there was an entitlement to the same type and amount of benefit. The indexation clearly linked the amount of the Austrian family benefits to the child's actual place of residence.

In the parliamentary debate, it was also pointed out that, even after indexation, Austrian family benefits were usually far higher than those paid by the State of residence.

Pursuant to Article 60(1) of Regulation No 987/2009, for the purposes of applying Articles 67 and 68 of Regulation No 883/2004, the situation of the whole family shall be taken into account as if all the persons involved were subject to the legislation of the Member State concerned and residing there, in particular as regards a person's entitlement to claim such benefits.

Accordingly, in its judgments of 22 October 2015, C-378/14, *Trapkowski*, EU:C:2015:720, paragraph 35 and of 18 September 2019, C-32/18, *Moser*, ECLI:EU:C:2019:752, paragraph 38, the Court of Justice confirmed 'that the deeming provisions included in Article 67 of Regulation No 883/2004 have the effect that a person may claim family benefits for members of his family who reside in a Member State other than that responsible for paying those benefits, as if they resided in that Member State.'

Assuming that the family members are resident in Austria, there would also be an entitlement to family allowance in the same amount as that paid for children

residing in Austria. In other words, the Union legislature deliberately opted for equal treatment in the sense of entitlement to the same benefits in terms of type and amount.

However, the *Trapkowski* case essentially concerned the question of whether the third sentence of Article 60(1) of Regulation No 987/2009 required that the parent of the child for whom family benefits are paid, who resides in the Member State required to pay those benefits, must be granted entitlement to those benefits because the other parent, who resides in another Member State, has not made an application for family benefits. The Court of Justice answered that question in the negative.

In the *Moser* case, the Court of Justice clarified that the second sentence of Article 60(1) of Regulation No 987/2009 is applicable to all benefits payable in accordance with Article 68 of Regulation No 883/2004.

However, in the *Moser* case, in relation to the childcare allowance at issue in that case, the Court of Justice held that the differential supplement under Article 68 of Regulation No 883/2004 is payable on the basis of the income actually earned in the Member State of employment obliged to pay the benefit, and pointed out that, in border situations, earnings are generally higher in the worker's Member State of employment.

Benefits intended to meet family expenses

Pursuant to Article 1(z) of Regulation No 883/2004, '"family benefit" means all benefits in kind or in cash intended to meet family expenses'. Paragraph 1 FLAG 1967 states that the benefits provided under that law are granted 'in order to bring about burden sharing in the interests of the family'. According to the law's legislative texts, this would take the form of relief based on the actual cost of living, which could vary depending on the place of residence. If the benefit were granted without the amount ever being changed despite different price levels, this would either lead to overfunding or redistribution not required by the fundamental freedoms (if the child's country of residence is a country with low purchasing power), or to underfunding (if the child's country of residence is a country with higher purchasing power), which would hinder the free movement of persons.

Austrian family benefits are financed, on the one hand, by the Familienlastenausgleichsfond (Family Burden Equalisation Fund), which is essentially financed in particular by contributions from employers based on the total wages paid by them, but also by shares of the revenue from corporation tax and income tax (family allowance), and, on the other hand, by the general revenues from income tax (tax credits). The appellant asserts that she co-finances Austrian family benefits with her income and is therefore entitled to them in full; in this respect, she refers to the Opinion of Advocate General Mancini of 21 May 1985, 41/84, *Pinna*, ECLI:EU:C:1985:215, point 6.C.).

As regards the interpretation of Article 7 of Regulation No 883/2004, the referring court takes the view that it should be noted that, interpreted in line with common parlance, the Austrian indexation of family benefits to be granted on the basis of Regulation No 883/2004, even if not affected by the deeming provision of Article 67 of Regulation No 883/2004, is subject, pursuant to Article 7 of Regulation No 883/2004, to the prohibition on amendment (in the present proceedings: reduction) based on the actual place of residence of family members. The legislative texts state, inter alia, that, irrespective of the actual financial impact, the effect of the funding should, in the sense of an appropriate solution, depend on the actual circumstances with regard to covering living costs. It is not a question of whether or not family benefits can be indexed, but whether the export obligation with regard to Austrian family allowances — which is not called into question in the present draft — relates to the amount or the value. In this respect, it is considered that it is permissible to index a cash benefit not financed by social security contributions while respecting the prohibitions on discrimination arising from the free movement of persons.

According to those who believe that the Austrian scheme is compatible with EU law, the Austrian cash benefit was not 'reduced', since the weighting of the family allowance and the other family benefits according to purchasing power was linked to the different cost of living in the respective country of residence and therefore always provided the same consumer basket. The benefit changed only 'in terms of the numerical amount and not in terms of value'. Since the link to the cost of living merely served to achieve equal treatment and was even used in other areas of the legal system, it did not appear to be inherently devoid of purpose.

The aim of the purchasing power parity calculation was precisely to ensure that family benefits remained unchanged and constant in terms of substance and value. The value of the cash benefit should therefore remain virtually unchanged in relation to the domestic situation and should not be influenced by inflation and purchasing power differences between the Member States. The wording 'as if' in Article 67 of Regulation No 883/2004 should therefore be understood as meaning that the amount of family benefits for family members residing in another Member State must correspond not formally (in terms of amount) but substantively (in terms of value) to that of family benefits for family members residing in the national territory. A value-based analysis would therefore result in the conclusion that, according to the Austrian model, a change of residence within the EU, European Economic Area or Switzerland could not influence, change or reduce Austrian family benefits; rather, their value was the same in each State of residence. A model that used index adjustment to secure family allowances in the EU, EEA or Switzerland to the same (value-based) extent as in the case of domestic residence could not be said to have a unilaterally onerous effect. In such a model, migrant workers did not lose any of the social security rights of a Member State in such a way as to discourage them from exercising their right to free movement.

As long as there were still large differences in purchasing power in Europe, this model could contribute to greater justice, on the one hand, and even facilitate mobility and therefore the free movement of workers, on the other hand.

In the parliamentary debate, however, it was also pointed out that within Austria, for example, indexation was not carried out in respect of the different cost of living in the individual regions, and the Austrian family allowance and tax credits were flat-rate benefits that did not take account of circumstances specific to the place of residence. There was also a difference between eastern Slovakia and the West, as the cost of living in the Bratislava region was significantly higher than in the Vienna region, for example. All of these different regions and different costs of living were not reflected. It was also pointed out that, particularly in the case of health and hygiene products needed for small children, the products were often the same as those in Austria and also cost the same there.

It is also argued that, in the context of covering child maintenance, the recipients of the allowance not only made use of the shopping basket of the child's State of residence, but also made purchases in the State of employment.

It follows from all these considerations that the Court of Justice must be asked to give a preliminary ruling under Article 267 TFEU.