Case C-372/20

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:

6 August 2020

Referring court:

Bundesfinanzgericht (Austria)

Date of the decision to refer:

30 July 2020

Appellant:

QY

Respondent authority:

Finanzamt Wien für den 8., 16. und 17. Bezirk (Vienna Tax Office, Areas 8, 6 and 17)

Subject matter of the main proceedings

Entitlement to Austrian family allowances under the Familienlastenausgleichsgesetz (Law on compensation for family expenses, 'FLAG') for a German national while working for an Austrian aid organisation in Uganda – Determination as to whether that situation falls within Article 11(3)(a) or (e) of Regulation No 883/2004 – Member State of employment – Member State of residence – Entitlement under national law – Indirect discrimination

Subject matter and legal basis of the reference

Interpretation of EU law, Article 267 TFEU

Questions referred

Question 1:

Is Article 11(3)(e) of Regulation (EC) No 883/2004 to be interpreted as covering a situation in which a female worker who is a national of a Member State in which she and her children also reside enters into an employment relationship as a development aid worker with an employer established in another Member State, and that employment relationship is subject to the compulsory insurance scheme under the legislation of the State of establishment, and she is posted by the employer to a third country not immediately after being employed but after completing a preparatory period and returning to the State of establishment for reintegration periods?

Question 2:

Does a legal provision of a Member State such as Paragraph 53(1) FLAG, which, inter alia, makes independent provision for equal status with nationals, infringe the prohibition on the transposition of regulations within the meaning of the second subparagraph of Article 288 TFEU?

Questions 3 and 4 relate to the case where the applicant's situation falls within Article 11(3)(e) of Regulation No 883/2004 and where EU law requires only the Member State of residence to provide family benefits.

Question 3:

Is the prohibition of discrimination based on nationality enshrined for employees in Article 45(2) TFEU and, on a subsidiary basis, in Article 18 TFEU to be interpreted as meaning that it is incompatible with a national provision such as Paragraph 13(1) of the Entwicklungshelfergesetz (Law on development aid workers) in the version applicable until 31 December 2018 ('old version'), which connects entitlement to family benefits in the Member State not responsible under EU law with the fact that the development aid worker must have had his centre of interests or habitual residence in the territory of the Member State of establishment before commencing employment, whereby that requirement must also be met by nationals?

Question 4:

Are Article 68(3) of Regulation (EC) No 883/2004 and Article 60(2) and (3) of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing social security systems, OJ 2009 L 284 ('Regulation (EC) No 987/2009' or 'the Implementing Regulation') to be interpreted as meaning that the institution of the Member State which was presumed by the applicant to be the State of employment with primary responsibility and to which the application for family benefits was submitted, but whose legislation is applicable on neither a primary nor secondary basis, but in which there is an entitlement to family benefits under an alternative rule of the law of the Member State, must apply by analogy the provisions relating to the obligation to forward the application, to inform the person concerned, to take a

provisional decision on the priority rules to be applied and to provide provisional cash benefits?

Question 5:

Is the obligation to take a provisional decision on the priority rules to be applied incumbent solely on the respondent authority, as the institution, or also on the administrative court seised on appeal?

Question 6:

At what point in time is the administrative court obliged to take a provisional decision on the priority rules to be applied?

Question 7 relates to the case where the applicant's situation falls within Article 11(3)(a) of Regulation No 883/2004 and EU law requires the Member State of employment and the Member State of residence to provide family benefits jointly.

Question 7:

Are the words 'th[e] institution shall forward the application' in Article 68(3)(a) of Regulation No 883/2004 and in Article 60 of Regulation No 987/2009 to be interpreted as meaning that those provisions link the institution of the Member State with primary responsibility and the institution of the Member State with secondary responsibility in such a way that both Member States must jointly settle ONE (one as in a singular) application for family benefits, or must the applicant make a separate application for the additional payment that may have to be made by the institution of the Member State whose legislation is applicable on a secondary basis, with the result that the applicant must submit two physical applications (forms) to two institutions of two Member States, which, by their nature, will trigger different time limits?

Questions 8 and 9 concern the period from 1 January 2019, when Austria abolished, alongside the introduction of the indexation of family allowances, the granting of family allowances for development aid workers by repealing Section 13(1) EHG, old version.

Question 8:

Are Articles 4(4), 45, 208 TFEU, Article 4(3) TEU and Articles 2, 3, 7 and Title II of Regulation No 883/2004 to be interpreted as meaning that they generally prohibit a Member State from abolishing family benefits for a development aid worker who takes his family members with him to the place of employment in the third country?

In the alternative, Question 9:

Are Articles 4(4), 45, 208 TFEU, Article 4(3) TEU and Articles 2, 3, 7 and Title II of Regulation No 883/2004 to be interpreted as meaning that, in a situation such as that in the main proceedings, they guarantee to a development aid worker who has already acquired entitlement to family benefits for previous periods of time an individual and specific continuation of that entitlement to family benefits for periods of time, even though the Member State has abolished the granting of family benefits for development aid workers?

Provisions of EU law cited

Article 4(2) and (3) TEU; Articles 4, 45, 48, 208, second subparagraph of Article 288 TFEU

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, in particular Articles 7, 11(3)(a) and (e), 67 and 68

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, in particular Articles 11, 60(2) and (3)

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, in particular Article 7(1) and (2)

Provisions of national law cited

Allgemeines Sozialversicherungsgesetz (General Law on social security, 'ASVG'), in particular point 9 of Paragraph 4(1), pursuant to which skilled development aid workers within the meaning of Paragraph 2 of the Law on development aid workers are covered under the health, accident and pension insurance schemes.

Bundesabgabenordnung (Federal Tax Code, 'BAO'), in particular Paragraph 26(1), pursuant to which a person is resident in the place where he has a residence under circumstances that indicate that he will maintain and use the residence, and subaragraph (2), pursuant to which a person has his habitual residence where he lives under circumstances that indicate that he will stay in that place or country not just temporarily. Pursuant to subparagraph (3), Austrian citizens who are in an employment relationship with a public-law body and whose place of work is located abroad (foreign civil servants) are treated as if their habitual residence were located in Austria.

Familienlastenausgleichsgesetz (Law on compensation for family expenses), in particular Paragraph 2 Pursuant to Paragraph 2(1), persons who have a residence

or their habitual place of residence in Austria are entitled to family allowances for minor children. Pursuant to Paragraph 2(8) of the FLAG, persons are entitled to receive family allowances only if their centre of interests lies in Austria. Pursuant to Paragraph 5(3) of the FLAG, there is no entitlement to family allowances for children who permanently reside abroad. Pursuant to Paragraph 53(1) of the FLAG, citizens of contracting parties to the Agreement on the European Economic Area (EEA) are to be treated as equivalent to Austrian citizens. The permanent residence of a child in a State of the European Economic Area is to be treated as equivalent to the permanent residence of a child in Austria.

The newly enacted Paragraph 53(5) of the FLAG is applicable with effect from 1 January 2019, pursuant to which Paragraph 26(3) BAO only applies until 31 December 2018 with regard to benefits under that Federal law. From 1 January 2019, Paragraph 26(3) BAO is applicable to benefits under that Federal law only for persons whose place of employment is abroad and who are working on behalf of a local or regional authority, as well as for their spouses and children.

Entwicklungshelfergesetz (Law on development aid workers, 'EHG'), in particular Paragraph 13. Paragraph 13(1) EHG, in the version applicable until 31 December 2018, provided that, with regard to the entitlement to family benefits, skilled workers and the family members living with them in a joint household are to be treated as if they were not permanently resident in the country of their assignment for the duration of the preparation and assignment abroad, provided that those persons are Austrian citizens or persons treated as such by EU law. With effect from 1 January 2019, Paragraph 13(1) EHG was repealed and deleted without replacement. This means that entitlement to family allowances for development aid workers was effectively abolished with effect from 1 January 2019.

Brief summary of the facts and procedure

1 The appellant has German nationality. Her husband, to whom she has been married since 2008, is a Brazilian citizen. They have three children who are also German citizens and were born on 30 October 2011, 22 January 2015 and 11 December 2017.

2 On 6 September 2016, the appellant established an employment relationship as a development aid worker with an Austrian employer. According to the employment contract, the place of employment is Vienna (Austria). After completing a preparatory course from 6 September 2016 to 21 October 2016, she started her assignment abroad on 31 October 2016 in Uganda, where her family members accompanied her and where she worked until 15 August 2019, except for a maternity break in the period from 17 October 2017 to 7 February 2018, during which the appellant and her family members lived with her parents in Germany. The reintegration month took place in Vienna from 15 August 2019 to 15 September 2019. This brought an end to the employment relationship.

3 For the duration of their employment relationship, the appellant and her family members were covered by social insurance in Austria and were registered as having a principal place of residence there. They had staff accommodation that was provided by the employer, but with the restriction that the appellant and her family could use it only during the preparation and reintegration periods. During her assignment abroad, the accommodation was given to other development aid workers.

4 The appellant's parents have a 180 m² residence in Germany, in which she has two rooms at her disposal, which she last used from March 2016 to September 2016 and during the aforementioned maternity break. Between 2013 and March 2016, the appellant and her children resided alternately in Germany and Brazil, where the husband owns land and worked as a self-employed farmer. The husband accompanies the appellant on her assignments. While working as a development aid worker, she spent all her holidays in Germany, and all her children were born in Germany. Her bank accounts are also located in Germany. The appellant's parents, with whom she and her children have a very close relationship, also live there.

5 However, the appellant confirms that she, the children and the father of the children did not have a shared family residence in Germany or Brazil. The family residence where she, the children and the father of the children had their common centre of interests and where they were always actually together was always at the respective places of assignment.

6 Up until September 2016 inclusive, the appellant received child benefits for the first two children in Germany under the German Kindergeldgesetz (Law on child benefit). From October 2016, the German institution stopped paying the child benefits on the grounds that the appellant had been working in Austria since 6 September 2016 and the father of the children was not working in Germany, which meant that Austria had primary responsibility for paying family benefits. The German institution did not inform the Austrian institution of the cessation of the payment of the child benefits.

7 The granting of the Austrian family allowance under the FLAG and tax credits under the Einkommensteuergesetz (Law on income tax) was applied for by two applications of 5 October 2016 for the first two children as from October 2016 and by application of 8 January 2018 for the third child as well. In all cases, the respondent authority as the competent institution rejected the applications as unfounded. The competent institution in Germany was not contacted by the respondent authority. Nor has a provisional decision been taken as to which institution has primary responsibility. No application for the payment of the differential supplement under Article 68(2) of Regulation No 883/2004 was submitted to the institution in Germany.

8 The appellant lodged an appeal against the rejection of the applications, which was dismissed by the respondent authority. An appeal was in turn lodged against

that dismissal and the cases were submitted for decision to the Bundesfinanzgericht (Federal Finance Court) as the competent court.

Principal arguments of the parties to the main proceedings

9 The appellant takes the view that, on account of the preparatory period and the registration of residence, Austria was at least the 'notional' State of employment within the meaning of Article 11(3)(a) of Regulation No 883/2004. She received her instructions from Vienna, which, according to the contract, was her place of employment. The preparatory course had taken place in Vienna and the reintegration month had been spent there. By registering her residence in Austria, she had shifted her centre of interests to Austria and therefore fulfilled the requirements of Paragraph 13(1) EHG, old version, in conjunction with Paragraph 26 BAO. The respondent authority's interpretation of that provision contradicted both national principles of interpretation and those under European law, because the decisive factor was not in fact residence in Austria. That interpretation also followed from the obligation of equal treatment laid down in Article 3 of Regulation No 1408/71. Referring to the judgment of 15 January 1986, *Pinna* (41/84, EU:C:1986:1, paragraph 23), it is asserted that the Court of Justice expressly described the use of the place of residence of family members as a distinguishing criterion for entitlement to family benefits as a 'covert form of discrimination', which was prohibited.

10 The respondent authority takes the view that, as a foreign national of the EU, the appellant was wrongly covered under the Austrian social security scheme, because her work as a development aid worker had been carried out in a third country, which meant that she did not fall within the scope of Regulation No 883/2004 and was not entitled to Austrian family allowances. As the activity was carried out in a third country, Austria was not the State of employment. The accommodation made available by the employer in Vienna satisfied neither the conditions for residence under Article 1(j) of Regulation No 883/2004 nor those for a stay under Article 1(k) of that regulation. Accordingly, Austria was not the Member State of residence either.

11 An assessment based solely on legal principles under national law likewise precluded the granting of family allowances. Paragraph 13(1) EHG, old version, must be interpreted as meaning that that provision merely preserved – but did not establish – an entitlement to family allowances previously acquired in accordance with the general principles (residence or stay in Austria, centre of interests in Austria, children who were part of the household of the person entitled to benefits and who were not staying abroad on a permanent basis). Even nationals must have already acquired an entitlement to family allowances before taking up employment as development aid workers by fulfilling the fundamental requirements; therefore, foreign nationals of the EU were not discriminated against under Paragraph 53(1) FLAG, but were treated on an equal footing with nationals, and consequently the principle of equality was not infringed.

12 The respondent authority bases its view of the law on the instruction of the official of the Federal Chancellery who is competent in this matter and the uncontested judgment of the Bundesfinanzgericht (Federal Finance Court) of 14 April 2014, by which a Dutch development aid worker was also denied family allowances in a comparable situation.

Brief summary of the basis for the reference

13 The referring court takes the view that the present case essentially concerns the question of whether Austria is the State of employment within the meaning of Article 11(3)(a) of Regulation No 883/2004 and is therefore primarily obliged to grant the appellant the family allowances applied for. Were Austria not to be regarded as the State of employment, the Member State of residence would be responsible for granting them pursuant to Article 11(3)(e) of that regulation. On the basis of the appellant's living situation described above, the referring court takes the view that Germany must be regarded as the Member State of residence. In the alternative, the question is whether Paragraph 13(1) EHG, old version, establishes an entitlement for the appellant under purely national law, that is to say separately from EU law, and this raises the question of whether Paragraph 13(1) EHG, old version, is laid down in an indirectly discriminatory manner or is interpreted in an indirectly discriminatory manner. The referring court makes the following observations on the individual questions:

14 Question 1: This question concerns the delineation of Article 11(3)(a) and (e) of Regulation No 883/2004. The appellant entered into an employment relationship with an Austrian employer and is subject, with that employer, to the Austrian compulsory insurance scheme under the national legislation. The referring court takes the view that Austria therefore fulfils the conditions for having the status of Member State of employment. However, if the Court of Justice were to conclude that the development aid work falls within the residual rule of Article 11(3)(e) of Regulation No 883/2004, different Member States would bear responsibility for social security (Austria) and family benefits (Germany).

15 It is only in the case of a Latvian seaman (judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381) that the Court of Justice has previously addressed the pursuit of an activity in a third country in relation to the scope of Regulation No 883/2004. In that judgment, the Court of Justice expressly referred to Article 11(3)(e) of Regulation No 883/2004 as a residual rule for cases involving a third country. The activity was exclusively in the third country in that case, however. The present case differs from this as a result of the preparation period completed in Austria before the posting to the third country and the reintegration period spent in Austria after returning. In any event, it is clear to the referring court that, in the case of a development aid worker, the employment relationship via the employer's State of establishment always provides a connecting factor, which is why Austria must, in the view taken by the referring court, be regarded as the Member State of employment.

16 Question 2: The referring court points out that Paragraph 53(1) FLAG is an Austrian provision only in the formal sense, whereas, substantively, it regulates EU law by reproducing – partly to the letter and partly in spirit – the content of regulations. The referring court considers this to be problematic because Paragraph 53 FLAG leads one to interpret the EU-law requirement of equal status according to national criteria and not EU-law criteria, thus obscuring the perspective of directly applicable EU law and jeopardising the Court of Justice's monopoly over interpretation.

17 Question 3 (indirect discrimination of foreign nationals of the EU by Paragraph 13(1) EHG, old version): Question 3 (and also Question 4) is relevant only if the situation in the main proceedings falls within Article 11(3)(e) of Regulation No 883/2004 and EU law obliges only the Member State of residence (which, in the view taken by the referring court, is Germany in the present case) to provide family benefits.

18 Paragraph 13(1) EHG, old version, is to be regarded as an alternative legal basis of a Member State, similar to the case in the judgment of 12 June 2012, *Hudzinski* (C-611/10 and C-612/10, EU:C:2012:339). As such, it must be laid down in a non-discriminatory manner. However, the referring court takes the view that it is interpreted in a way that is at least indirectly discriminatory, since, according to the interpretation given by the respondent authority, it is a prerequisite that an entitlement to family allowances must have existed before the employment as a development aid worker was entered into. It is easier for nationals to meet this requirement. Furthermore, the contested decisions do not explain for how long the entitlement acquired, before the commencement of the activity as a development aid worker, must have existed.

19 Question 4 (Procedural obligations of the Member State not responsible): EU law imposes the obligations addressed in Question 4 on the competent institution of the Member State whose legislation is applicable on a secondary basis. However, the referring court takes the view that Austria does not have secondary responsibility under any circumstances. Under EU law, Austria is either the State of employment or a Member State without responsibility, on an alternative finding of the facts. There is no provision in Regulation Nos 883/2004 or 987/2009 which expressly imposes on the Member State that is not responsible the requirement to fulfil the obligations addressed in this question. According to the findings of the referring court, in the present case the Austrian institution did not take any steps to inform the German institution of the appellant's application in Austria. The proceedings in Austria are now at the stage of an appeal to the Federal Finance Court. The referring court therefore poses the question of whether – and if so, to what extent – failures on the part of the institution are transferred at a later stage of the procedure to the court seised. The referring court takes the view that there is not yet any case-law of the Court of Justice on these points of law.

20 Article 68(3) of Regulation No 883/2004 and Article 60(2) and (3) of Regulation No 987/2009 pursue the objective of guaranteeing rights for migrant workers from

both a temporal and personal perspective. In this specific case, the point in time at which the application is made, which limits the entitlement in time, is of interest. In particular, it appears to be questionable whether the person concerned will be able to maintain the fiction that an application was submitted in good time in the Member State with primary responsibility,. According to the findings of the referring court, no application was submitted to the German institution. It is therefore questionable – in the event that Austria is not primarily responsible – whether the authorities in that Member State were obliged to forward the applications to Germany and whether the appellant benefits from a fiction of having complied with the time limit.

21 The referring court takes the view that, in the event of legal proceedings, the obligation of the institution that failed to act could be transferred to the court seised. If that view were to be taken, the obligation to take a provisional decision within the meaning of Article 60(3) of Regulation No 987/2009 would be transferred to the court seised and the concept of 'institution' should therefore not be understood in absolute terms. The whole point of an effective legal remedy is to achieve comprehensive legal protection. The purpose of a provisional decision is to provide the applicant with quick access to clarification of responsibilities and to the receipt of family benefits. In order to achieve these objectives, the assumption that the obligation to take the provisional decision is to be transferred to the court ought to be accepted.

22 Question 5 (Scope of the court's competence): Since the institutions are connected to one another by means of electronic data exchange, a transfer of the obligation to take a decision could be limited to the effect that the court seised would only have the power to order the institution to take such a decision, whereby the court has to determine its content. In this specific case, the referring court has taken a provisional decision and instructed the respondent authority, as the institution, to forward it to the competent German institution and to conduct a dialogue procedure between the institutions.

23 Question 6: By this question, the referring court seeks to ascertain the point in time at which the court seised is obliged to take a provisional decision on the applicable priority rules. In that regard, the referring court merely states that, in its view, if the competent institution has not complied with that obligation, the court seised is obliged to take such a decision as soon as the appeal is brought before it.

24 Question 7 (absence of an application in the Member State with secondary responsibility) This question is relevant if the Court of Justice considers Austria to be the State of employment, which would mean that Austria has primary responsibility. Article 68(3) of Regulation No 883/2004, which governs the fiction of compliance with the time limit, relates to the opposite case (forwarding by the Member State with secondary responsibility) and, based on its wording, is not relevant in the present case. The situation at issue here falls within the scope of the second and third subparagraphs of Article 60(2) of Regulation No 987/2009, which provides for the obligation of the Member State with primary responsibility

to forward applications, but does not expressly guarantee compliance with the time limit.

25 The referring court questions whether, in view of the obligation of the institution of the Member State whose legislation is applicable by priority to forward applications to the institution of the Member State whose legislation is applicable on a secondary basis, a separate application is in fact required for the differential supplement pursuant to Article 68(2) of Regulation No 883/2004. By virtue precisely of the absence of the fiction of compliance with a time limit such as that in Article 68(3) of that regulation, EU law, which is characterised by the concept of legal protection, could be interpreted as meaning that the two institutions are connected to one another by the regulations in such a way that they have to handle a *single* application jointly. Consequently, the lack of an express provision for a fiction in the second subparagraph of Article 60(2) of Regulation No 987/2009 cannot be regarded as being contrary to the objective pursued and the question of an analogous application of Article 68(3) of Regulation No 883/2004, which governs compliance with time limits, would not be necessary.

26 Questions 8 and 9: These questions are relevant only if the Court of Justice concludes that Paragraph 13(1) EHG, old version, either generally confers an alternative entitlement to Austrian family allowances on the appellant, because Austria must restore the old legal situation for reasons of sincere cooperation, or individually confers it until 31 December 2018, from which the continued existence of the entitlement could be derived.

27 The referring court takes the view that it is questionable whether the abolition of family allowances for development aid workers constitutes an interference with the fundamental right of freedom of movement for workers under Article 45 TFEU. Since the Court of Justice has developed all fundamental freedoms into general prohibitions on restriction (see judgment of 30 November 1995, *Gebhard*, C-55/94, EU:C:1995:411, paragraph 37), the abolition of family allowances could be interpreted as a prohibited restriction, as it is capable of hindering the exercise of the freedom of movement for workers and making it less attractive.

28 Although the abolition of family allowances for development aid workers does not constitute direct discrimination, because it is not linked to nationality, there is indirect discrimination on grounds of nationality if the granting of family allowances is made subject to conditions for residence, domicile or stay. In this connection, the referring court refers to the judgment of 24 January 2019, *Balandin and Others* (C-477/17, EU:C:2019:60, paragraph 38 et seq.), and the order of 5 September 2019, *Caisse pour l'avenir des enfants* (C-801/18, not published, EU:C:2019:684, paragraph 49).

29 As regards possible justification for an interference with the freedom of movement for workers, the referring court takes the view that no justification can be accepted, as the real reason for the abolition of family allowances for development aid workers in Austria lies in economic considerations, namely not

exporting family benefits to a third country, and the Court of Justice does not recognise purely economic considerations as a justifying circumstance.

30 Even if the abolition of family allowances for development aid workers were justified, it would also have to be proportionate, which, in the view taken by the referring court, is not the case either. Since Austria has abolished family allowances only for development aid workers, but has preserved them for embassy staff, for example, it could be questionable whether Austria has acted coherently, since the measure is not appropriate from the outset.

31 If Question 8 is answered in the negative, the referring court takes the view that it is questionable whether the appellant has acquired an individual and specific entitlement to the continued existence of family allowances in the sense of acquired rights (see judgment of 26 November 2009, *Slanina*, C-363/08, EU:C:2009:732).