

Case C-411/20

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:

2 September 2020

Referring court:

Finanzgericht Bremen (Germany)

Date of the decision to refer:

20 August 2020

Applicant:

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Defendant:

Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit

Subject matter of the main proceedings

Freedom of movement – Social security – Directive 2004/38/EC – Regulation No 883/2004 – Family benefits – Child benefit – Proof of national income – Equal treatment

Subject matter and legal basis of the reference for a preliminary ruling

Interpretation of EU law, Article 267 TFEU

Question referred for a preliminary ruling

Must Article 24 of Directive 2004/38/EC and Article 4 of Regulation (EC) No 883/2004 be interpreted as precluding legislation of a Member State under which a national of another Member State, who establishes a permanent residence or habitual residence in the Member State concerned and does not prove that he has national income from agriculture and forestry, business, employment or self-employment, has no entitlement to family benefits within the meaning of

Article 3(1)(j) of Regulation (EC) No 883/2004, in conjunction with Article 1(z) thereof, for the first three months of establishing a permanent residence or habitual residence, whilst a national of the Member State concerned, who is in the same situation, does have an entitlement to family benefits within the meaning of Article 3(1)(j) of Regulation (EC) No 883/2004, in conjunction with Article 1(z) thereof, without proving national income from agriculture and forestry, business, employment or self-employment?

Provisions of EU law relied on

Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ('Directive 2004/38'), in particular Article 24

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 1, 3 and 4

Provisions of national law relied on

Einkommensteuergesetz (Law on income tax; 'EStG'), in particular Paragraphs 31, 62(1) and (1a),

Sozialgesetzbuch (Social Code; 'SGB') Second Book (II), Paragraph 11

Succinct presentation of the facts and the main proceedings

- 1 The applicant is the mother of three children born between 2003 and 2010. The father of the applicant's children is her husband V. The applicant, V. and the three children are Bulgarian nationals.
- 2 At the end of October 2019 the applicant applied to the defendant for child benefit. The applicant gave an address in Bremerhaven (Germany) as her residential address and in this respect submitted a rental agreement for a flat. The registration and household certificates submitted in the further course of the proceedings showed 19 August 2019 as the date on which she, her husband and three children moved from Bulgaria and also 19 August 2019 as the date on which they moved into the rented flat. On the basis of an overall assessment of the abovementioned documents and the other documents submitted, the defendant was satisfied that the applicant and her three children had had a permanent residence in Germany within the meaning of Paragraph 62 of the EStG since 19 August 2019. The defendant was also able to identify the applicant, her

husband and her three children by means of identification numbers assigned to each of them under the second sentence of Article 62(1) of the EStG and the third sentence of Paragraph 63(1) thereof.

- 3 In the administrative proceedings the applicant stated that she had been seeking employment from 19 August 2019 until 4 November 2019 and had been employed as an employee at Z-Service GmbH in Bremerhaven, with a regular working time of 20 hours a week, since 5 November 2019. She submitted an employer's certificate from that undertaking showing that her husband V. had been employed there regularly for 20 hours per week, without interruption, since 5 November 2019.
- 4 By decision of 27 December 2019, the defendant refused to grant child benefit for the three children as from August 2019. The applicant lodged an objection to this with the defendant on 20 January 2020. As grounds, the applicant stated that she and her family were entitled to freedom of movement. Her husband had worked in the period from 5 November 2019 to 12 December 2019. For this reason, the status of worker had been qualified for. She herself had found work from 17 January 2020.
- 5 By decision of 6 April 2020, the defendant dismissed the applicant's objection as unfounded.
- 6 The defendant essentially stated the following grounds for its decision: Under Paragraph 62(1a) of the EStG, in the first three months following establishment of a permanent residence or habitual residence in Germany nationals of the European Union and the European Economic Area who are entitled to freedom of movement and resident in Germany may obtain child benefit only if they receive ongoing national income from agriculture and forestry, business, employment or self-employment. In the present case no entitlement to child benefit during the first three months following establishment of permanent residence in Germany exists since no national income was received during the first three months. The applicant is not in gainful employment and the father of the children, V., was in minor employment in the period from 5 November 2019 to 12 December 2019.
- 7 On 10 May 2020 the applicant brought an action against the objection decision of 6 April 2020 before the referring court. As grounds, she states that an entitlement to child benefit exists because her husband V. is in fact working.
- 8 The applicant requests, in essence, that the defendant be ordered to grant her child benefit for children S., N. and A. for the months August 2019 to October 2019 and the decision of 27 December 2019 in the form of the objection decision of 6 April 2020 be annulled.
- 9 The defendant contends that the action should be dismissed.

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

- 10 German child benefit is granted to beneficiaries regardless of parental income and regardless of an individual and discretionary assessment of personal needs. It is funded not from the recipient's contributions, but by taxes. Under Paragraph 31 of the EStG, it has a dual function. It serves to exempt from tax, as required by the constitution, what is necessary for the child's minimum standard of living, including the need for care, upbringing and education, under the first sentence of Article 31 of the EStG, and, in so far as the child benefit is not required for this purpose, to promote the family under social law, under the second sentence of Article 31 of the EStG.
- 11 As a State contribution to the family budget, which is intended to reduce the costs of maintaining children, German child benefit is a cash benefit to meet family expenses. It is a social security benefit which falls under family benefits under Article 3(1)(j) of Regulation No 883/2004, in conjunction with Article 1(z) thereof.
- 12 In July 2019 subparagraph 1a was inserted into Paragraph 62 of the EStG. This rule is to be applied for the first time to child benefit assessments concerning periods which begin after 31 July 2019. The first sentence of Paragraph 62(1a) of the EStG stipulates inter alia that a national of another Member State has no entitlement to child benefit in the first three months of establishing a permanent residence or habitual residence in Germany. Under the second sentence of Article 62(1a) of the EStG, this does not apply if he proves that he receives income in Germany from agriculture and forestry, business, employment or self-employment, this is to say is gainfully employed.
- 13 The applicant has not provided evidence to show that she was gainfully employed in the months August 2019 to October 2019 at issue. Since, as a Bulgarian national, she is the national of another Member State and established a residence in Germany after moving there with the husband and three children from Bulgaria on 19 August 2019, she is, under the first sentence of Paragraph 62(1a) of the EStG, excluded from receiving German child benefit for the first three months of establishing her residence in Germany, that is to say in respect of the months August 2019 to October 2019 at issue.
- 14 By contrast, the entitlement to child benefit of the Federal Republic of Germany's own nationals, who establish a permanent residence or habitual residence in Germany after a stay in another Member State, is not dependent on them being gainfully employed.
- 15 The German legislature concluded that this unequal treatment is compatible with EU law because child benefit could provide an unintended incentive for movement from other Member States and inappropriate use of the social security scheme in Germany has to be prevented. For non-gainfully employed nationals of another Member State child benefit acts like a social benefit and, where assistance

under social law was required as income, reduces need (see Paragraph 11(1) of Book II of the Social Code). Therefore, Article 24(2) of Directive 2004/38 is applicable, which – by derogation from the duty of equal treatment laid down in Article 24(1) of Directive 2004/38 – provides for exclusion from entitlement to social assistance during the first three months of residence.

- 16 The Federal Government's draft law of 25 March 2019 does not expressly address whether, and if so, to what extent Article 4 of Regulation No 883/2004 can preclude refusal to grant German child benefit to non-gainfully employed nationals of another Member State during the first three months of establishing a permanent residence or habitual residence in Germany. The German legislature evidently considers any breach of the duty of equal treatment laid down in Article 4 of Regulation No 883/2004 justified by the possibility, provided for in Article 24(2) of Directive 2004/38, of restricting access to the national social assistance schemes for non-gainfully employed nationals of another Member State.
- 17 Furthermore, the Federal Government's draft law refers to the Court of Justice's findings in its judgment of 14 June 2016 concerning rules on the granting of child benefit in the United Kingdom (C-308/14, *Commission v United Kingdom*, ECLI:EU:C:2016:436, paragraph 63 et seq.), according to which Regulation No 883/2004 merely lays down, in relation to family benefits, conflict rules which determine what national law is to be applied in cross-border cases. Regulation No 883/2004 does not lay down the conditions creating the right to social security benefits. They fall within the competence of each national legislature.
- 18 By contrast, it is argued in academic writings that German child benefit cannot be classified as social assistance within the meaning of Article 24(2) of Directive 2004/38 because it is granted without a means test. As a family benefit within the meaning of Article 3(1)(j) of Regulation No 883/2004, in conjunction with Article 1(z) thereof, German child benefit is a genuine social security benefit which cannot be regarded as social assistance within the meaning of Article 24(2) of Directive 2004/38.
- 19 This view may be supported by the fact that Germany also has competence for granting family benefits to non-gainfully employed nationals of another Member State who reside in Germany. Article 67 of Regulation No 883/2004 provides that a person is to be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State. Article 11(3) of Regulation No 883/2004 confers competence for gainfully employed nationals of another Member State on the Member State in which the activity as an employed or self-employed person is pursued and competence for non-gainfully employed nationals of another Member State on the Member State of residence.

- 20 Article 4 of Regulation No 883/2004 lays down a duty of equal treatment. According to that provision, unless otherwise provided for by that regulation, persons to whom that regulation applies are to enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.
- 21 On account of the primacy of EU law, a breach of the duty of equal treatment laid down in Article 4 of Regulation 883/2004 renders the discriminatory feature of national law inapplicable where the other conditions for entitlement to the benefit are applied (settled case-law of the Court of Justice since the judgment of 16 December 1976, 63/76, *Inzirillo*, ECLI:EU:C:1976:192).
- 22 The exclusion of non-gainfully employed nationals of another Member State from receiving child benefit for the first three months from establishment of a permanent residence or habitual residence in Germany pursuant to the first sentence of Paragraph 62(1a) of the EStG constitutes overt, direct discrimination since the decisive distinguishing criterion is nationality. Regulation No 883/2004 itself contains no (express) provision authorising such a difference in treatment. Therefore, if it were concluded that the first sentence of Paragraph 62(1a) of the EStG breaches the duty of equal treatment laid down in Article 4 of Regulation No 883/2004, the provision would not be applicable as regards its discriminatory effects (exclusion from benefits). The applicant's entitlement to child benefit for the months August 2019 to October 2019 at issue would then arise from Paragraph 62(1)(1) and the second sentence of Paragraph 63(1) of the EStG, in conjunction with Paragraph 32(1) and (3) thereof.
- 23 If, on the other hand, it were concluded that the breach of the duty of equal treatment laid down in Article 4 of Regulation No 883/2004 is justified by the possibility provided for in Article 24(2) of Directive 2004/38 of restricting access to the national social assistance schemes for non-gainfully employed nationals of another Member State, the applicant would have no entitlement under the first sentence of Paragraph 62(1a) of the EStG to child benefit for the months August 2019 to October 2019 at issue.