Case C-199/21

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:

30 March 2021

Referring court or tribunal:

Bundesfinanzgericht (Austria)

Date of the decision to refer:

19 March 2021

Applicant:

DN

Defendant authority:

Finanzamt Österreich

Subject matter of the main proceedings

Freedom of movement of workers Family benefits Rights available on the basis of receipt of pensions State of the pension Recovery Competent Member State Payment of differential supplement

Subject matter and legal basis of the request

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

Question 1, referred together with Question 2:

Is the phrase ‘Member State competent for his/her pension’ in the second sentence of 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 (OJ 2004 L 166, p. 1, corrected in OJ 2004 L 200, p. 1), as amended by Regulation

(EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation No 883/2004') to be interpreted as meaning that it refers to the Member State previously competent for family benefits as the State of employment and now required to pay an old-age pension, the right to which is based on the freedom of movement of workers previously exercised in its territory?

Question 2:

Is the phrase 'rights available on the basis of receipt of pensions' in Article 68(1)(b)(ii) of Regulation No 883/2004 to be interpreted as meaning that the right to family benefits is to be regarded as being available on the basis of receipt of pensions if, first, the laws of the EU OR of the Member State governing the right to family benefits provide for receipt of pensions as a criterion and, second and additionally, the criterion of receipt of pensions is fulfilled in fact at a factual level, meaning that 'simple receipt of pensions' does not fall under Article 68(1)(b)(ii) of Regulation No 883/2004 and the Member State concerned is not to be regarded as the 'State of the pension' under EU law?

Question 3, referred in the alternative to Questions 1 and 2, if simple receipt of pensions suffices for the purpose of interpretation of the concept of the State of the pension:

In the case of receipt of an old-age pension, the right to which [accrued] under the migrant workers regulations and, prior to that, as a result of the pursuit of an activity as an employed person in a Member State in a period when neither the State of residence alone nor both States were Member States of the EU or the European Economic Area, is the phrase 'a differential supplement shall be provided, if necessary' in the second clause of the second sentence of Article 68(2) of Regulation No 883/2004 to be understood, in light of the judgment of 12 June 1980, *Laterza*, 733/79, as meaning that EU law guarantees family benefits to the maximum possible extent even in the case of receipt of pensions?

Question 4:

Is the third sentence of Article 60(1) of Regulation (EC) No 987/2009 to be interpreted as meaning that it precludes Paragraph 2(5) of the FLAG 1967, according to which, in the case of divorce, the right to the family allowance and tax credit for the child remains vested in the parent who is the head of the household but who has not made an application either in the State of residence or in the State of the pension for as long as the adult child in education is a member of his or her household, meaning that the other parent living as a pensioner in Austria, who in fact bears the entire cost of supporting the child, can exercise the right to the family allowance and tax credit for the child against the institution of the Member State whose laws take precedence based directly on the third sentence of Article 60(1) of Regulation No 987/2009?

Question 5, referred together with Question 4:

Is the third sentence of Article 60(1) of Regulation No 987/2009 to be further interpreted as meaning that it is also necessary, in order to substantiate the standing of the EU worker as a party in the Member State family benefits procedure, that he/she is mainly responsible for the cost of maintenance within the meaning of Article 1(i)(3) of Regulation No 883/2004?

Question 6:

Are the provisions governing the dialogue procedure in Article 60 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 (OJ 2009 L 284, p. 1, 'Regulation No 987/2009' or 'the implementing Regulation') to be interpreted as meaning that that procedure must be conducted by the institutions of the Member States involved not only where family benefits are granted, but also where family benefits are recovered?

Provisions of EU law cited

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems

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

Provisions of national law cited

Familienlastenausgleichsgesetz 1967 (Law on compensation for family expenses 1967, 'FLAG 1967'), Paragraphs 2, 2a, 10 and 26

Paragraph 2(2) of the FLAG states that the person entitled to the family allowance for a child referred to in Paragraph 2(1) is the person to whose household the child belongs. A person to whose household the child does not belong but who is mainly responsible for the cost of maintaining that child is entitled to the family allowance where no other person is entitled to receive it under the first sentence of that subparagraph.

Paragraph 2(5)(a) of the FLAG 1967 states:

'A child belongs to a person's household where he/she

shares with that person a dwelling that forms a single household. A child does not cease to be a member of the household:

if he/she stays outside the shared dwelling only temporarily.

A child is regarded as belonging to the household of both parents if they maintain a joint household to which the child belongs.

Paragraph 2a of the FLAG 1967 states:

(1) If a child belongs to the parents' joint household, the right of the parent mainly responsible for running the household takes priority over the right of the other parent. It is presumed, unless proven otherwise, that the mother is mainly responsible for running the household.

(2) Where subparagraph (1) applies, the parent with the priority right may waive that right for the benefit of the other parent. The waiver may also apply retroactively, but only for periods for which the family allowance has not yet been received. The waiver may be revoked.

Brief summary of the facts and procedure

1 The Finanzamt Österreich (Tax Office, Austria) is seeking recovery from the applicant of the family allowance for his adult child for the period from January to August 2013.

2 The applicant, who is Polish by birth, worked in Austria from 1989. At the beginning, he worked 3 weeks at a time in Austria and then spent 1 week with his family in Poland. From 1992 onwards, he visited Poland only occasionally. He obtained Austrian nationality in 2001 and is resident exclusively in Austria. His wife and daughter are resident in Poland and are Polish nationals. The applicant divorced his Polish wife in 2011. Prior to working in Austria, the applicant worked in Poland until the end of 1988.

3 The Austrian family allowance was always paid to the applicant, who passed it on to his daughter. A declaration of waiver by the mother was not demanded. In granting the allowance, the defendant authority assumed, based on the fact that the applicant pursued an activity as an employed person in Austria, that Austria was the State with primary competence.

4 The applicant has been in receipt of an old-age pension in Austria and in Poland since November 2011. It is on this that the defendant authority has based recovery of the Austrian family allowance and tax credit for the child. It contends that receipt of a pension in Poland substantiates Austria's lack of competence and also that the obligation to pay a differential supplement under Article 68(2) of Regulation No 883/2004 is irrelevant.

5 The daughter was studying in Poland in 2013. The Polish income threshold of PLN 539 per person was exceeded in 2013, meaning that the right to family

benefits in Poland lapsed. Neither the applicant nor the child's mother received Polish family benefits.

Brief summary of the basis for the request

6 The referring court states as regards Questions 1 and 2 that Austria is a typical State of residence for the purposes of family allowance legislation by operation of primary law. The family allowance does not depend on the pursuit of an activity as an employed person or receipt of pensions. Thus, Austria can only become a State of employment or a State of the pension in conjunction with EU law. The second sentence of Article 67 of Regulation No 883/2004 includes a separate and definitive instruction for pensions for the purpose of determining the one competent Member State. The applicant was employed from 1 May 2004 onwards further to the exercise of freedom of movement of workers, based on which he has been in receipt of a pension in Austria since November 2011. As that is a criterion laid down in Articles 67 and 68 of Regulation No 883/2004 for the right to family benefits, the referring court takes the view that Austria is the State of the pension under EU law and thus a competent Member State.

7 According to Article 67 of Regulation No 883/2004 only one Member State can be competent. As the applicant is in receipt of pensions in Austria and Poland, an additional criterion is needed in order to determine the one competent Member State. Article 68(1)(b)(ii) of Regulation No 883/2004 refers to 'rights available on the basis of receipt of pensions'. Contrary to the view taken by the defendant authority, Austria is a competent Member State in any case; the question is simply whether or not that competence takes priority.

8 The referring court takes the view that reversal of the priority between two Member States was regulated in Article 76 of Regulation (EEC) No 1408/71. That provision was subsequently amended several times. In the beginning, it referred to *Aussetzung* of the entitlement; in the last applicable version, however, it referred to *Ruhen*.

9 Under EU law, all Member States are States of employment in a situation that falls under the scope of Regulation No 883/2004. However, many Member States are already a State of employment under national law, as the right to family benefits depends upon the actual pursuit of an activity as an employed person as well as residence. These Member States are referred to in recent commentaries as the 'State of employment by operation of primary law', in order to distinguish them from the 'State of employment pursuant to EU law within the meaning of Article 67 of Regulation No 883/2004.

10 What is common to all the aforesaid versions of Article 76 of Regulation No 1408/71 is that they provided, where the State of residence is itself a State of employment under its domestic legislation, for it to 'take priority' over the competent State of employment under Article 73 of Regulation (EEC) No 1408/71. An explicit rule of EU law designated the State of residence as the

Member State with primary competence while, in the State of employment with secondary competence, the right to family benefits provided for under its laws was suspended up to the threshold amount. As the suspension under Article 76 of Regulation (EEC) No 1408/71 was not to be understood absolutely, the Court has provided clarification by developing the law and has already linked the two Member States within the scope of that Regulation to the effect that, where necessary, the Member State with secondary competence was required to pay the differential supplement.

11 Reference has to be made in that context to the judgment of the Court in *Sanina* (C-363/08). Following her divorce, Ms Sanina and her daughter moved from Austria to Greece. The child's father continued to carry on an occupation in Austria. Thus, Austria was the 'State of employment by operation of EU law' Ms Sanina did not work in Greece; hence Greece was simply a State of residence and Austria took priority in the obligation to pay family benefits. Had Ms Sanina started to pursue an occupation in Greece that substantiated a claim to Greek family benefits under Greek law, primary competence would have passed to Greece (as a 'State of employment by operation of primary law') and the claim to Austrian family benefits would have been suspended up to the sum provided for by Greek legislation.

12 As, where an occupation is pursued, both Member States must guarantee family benefits to the maximum extent, the referring court takes the view that the same should apply in the case of receipt of pensions. Regulation No 883/2004 coordinates the participating Member States in each permutation through standardisation and the adoption of a hierarchy by which the order of priority is determined and the joint obligation to ensure maximum family benefits is guaranteed. The joint obligation of the participating Member States in the case of pensions follows from the case-law of the Court, especially in *Laterza* (733/79).

13 According to the EU's Mutual Information System on Social Protection (MISSOC), residence is the only relevant factor for the receipt of family benefits in Poland. The pursuit of an occupation is not a prerequisite. This means that Poland would have to be typecast as a State of residence under its national legislation, with Austria as the State of the pension. The referring court takes the view that benefits are payable by more than one Member State for different reasons and Article 68(1)(a) of Regulation No 883/2004 therefore applies. Thus, Austria takes priority as the State of the pension and is obliged to pay benefits in full.

14 However, the defendant authority classed both Austria and Poland as States of the pension only and thus on an equal footing, meaning that, as the daughter's State of residence, Poland would be obliged to pay the benefits. As no right exists in Poland because the earnings threshold was exceeded, the referring court takes the view that Austria's liability for the differential supplement is unaffected and it should pay benefits as the Member State with primary competence.

15 Question 3 is referred in the alternative to Questions 1 and 2, as the case-law on this differs in Austria.

16 The referring court states with regard to Questions 4 and 5 that EU law establishes Austrian law as the (primary or secondary) applicable law. Paragraph 2(2) of the FLAG 1967 confers the primary right on the person to whose household the child belongs. Paragraph 2a of the FLAG 1967 is irrelevant to the situation at issue in the main proceedings, as the parents do not have a joint household. Under Austrian law, the mother living in Poland is the person authorised to make a claim. The defendant authority has pleaded, as an alternative ground for recovery, that the mother had a claim to the family allowance under Austrian law and that, as Austrian law allows any family allowance paid in error to be recovered from the person who had no right to it, the applicant should repay it and the mother living in Poland should apply for the family allowance herself. However, she would no longer receive it for the year 2013, as the deadline for making an application has expired.

17 The referring court questions whether the situation at issue in the main proceedings fulfils the criteria adopted in the third sentence of Article 60(1) of Regulation No 987/2009, as the mother, who has a claim under Austrian law, has not exercised her right; the inevitable legal consequence of this is that the Austrian institution has to take account of the application submitted by the other parent, that is the applicant. Although, in principle, EU law makes the Austrian rules applicable, an exception would have to be assumed were the application of the third sentence of Article 60(1) of Regulation No 987/2009 to take priority over Paragraph 2(2) of the FLAG 1967. Then the applicant could base his standing as a party directly on EU law, which would safeguard the child's claims. The question also arises as to whether the applicant's standing as a party depends on his being mainly responsible for the cost of maintenance (which he is).

18 It has to be noted with regard to Question 6 that the two Member States concerned must cooperate in a dialogue procedure and, if necessary, any differential supplement must be paid in order to guarantee family benefits for migrant workers to the maximum possible extent. The referring court questions whether that dialogue procedure is also compulsory for the purpose of recovery of family benefits, as the same rights and obligations apply in that procedure (as the *actus contrarius* to payment of the benefit).