

Anonymised version

Translation

C-27/23 – 1

Case C-27/23

Request for a preliminary ruling

Date lodged:

23 January 2023

Referring court:

Cour de cassation du Grand-Duché de Luxembourg (Luxembourg)

Date of the decision to refer:

19 January 2023

Appellant:

FV

Respondent:

Caisse pour l'avenir des enfants

[...]

[...] **Cour de cassation du Grand-Duché de Luxembourg (Court of Cassation, Grand Duchy of Luxembourg) [...], 19 January 2023**

[...]

[...] [composition]

between

FV, residing at [...], B-6741 Vance

appellant in cassation,

[...]

and

Caisse pour l’avenir des enfants (Children’s future fund; ‘the CAE’), a public body, established in [...], L-2449 Luxembourg

respondent in cassation,

[...]

Having regard to the judgment under appeal, delivered on 27 January 2022 [...] [references] by the Conseil supérieur de la sécurité sociale (Higher Social Security Board, Luxembourg);

[...]

[...] [other recitals]

Facts

According to the judgment under appeal, FV’s entitlement to the family allowances he had been receiving for the child FW, who had been in foster care in his home since 26 December 2005 under the terms of a court order, was withdrawn by decision of 7 February 2017 of the Governing Board of the CAE, with retroactive effect from 1 August 2016, on the grounds that the child had no child-parent relationship with him and was not regarded as a member of his family under Article 270 of the Code de la sécurité sociale (Social Security Code), as amended by the loi du 23 juillet 2016 (Law of 23 July 2016). The Conseil arbitral de la sécurité sociale (Social Security Arbitration Board, Luxembourg) varied the aforementioned decision and referred the case back to the CAE for the proceedings to be continued. By a further variation, the Higher Social Security Board upheld the CAE’s decision of 7 February 2017.

The first and second grounds of appeal combined

[...]

[...] [grounds alleging infringement of national law as a result of its discriminatory application and infringement of the constitutional principle of equal treatment; not relevant for the purposes of the question referred for a preliminary ruling in that they relate to national law and, as far as the allegations of discrimination are concerned, can be combined with the ground put forward by the public prosecutor of its own motion]

It follows that these grounds are inadmissible.

The third ground of appeal

[...]

[...] [ground alleging breach of procedural rules; not relevant for the purposes of the question referred for a preliminary ruling]

It follows that this ground is inadmissible.

Ground involving a question of public policy put forward by the public prosecutor

‘Alleging infringement of the principle of equal treatment guaranteed by Article 45 TFEU and by Article 7(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, 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 and of 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 No 883/2004 on the coordination of social security systems,

in that the Higher Social Security Board, on hearing an appeal against a judgment that had declared an action brought by the appellant in cassation against a decision to withdraw family allowances with effect from 1 August 2016 for a child placed in foster care in his home since 26 December 200[5] to be well founded, varied the judgment under appeal and held that the decision of the Governing Board of 7 February 2017 was to have full force and effect,

whereas the provisions referred to in this ground preclude the refusal to grant family allowance to a frontier worker who lives in another Member State of the European Union but who is employed in Luxembourg, such as the appellant in cassation, for children placed in his or her care in that other Member State by court order, since any child placed in care by court order and residing in Luxembourg is, under Article 269(1)(a) of the Social Security Code, entitled to that allowance’.

Response of the Cour de cassation

Article 269(1) of the Social Security Code provides:

‘An allowance for children’s future, “the family allowance”, is hereby established.

The following persons shall give rise to entitlement to the family allowance:

- (a) any child actually living in Luxembourg on a continuous basis and officially resident there;*
- (b) the members of the family, as defined in Article 270, of any person subject to Luxembourg law and covered by EU regulations or any other bilateral or*

multilateral instrument relating to social security concluded by Luxembourg providing for the payment of family allowances in accordance with the legislation of the country of employment. The family members referred to in this provision must reside in one of the countries to which the regulations or instruments in question apply.'

Article 270 of the Social Security Code provides:

'For the purposes of Article 269(1)(b), the following shall be regarded as members of a person's family and give rise to entitlement to family allowances: children born within marriage, children born outside marriage and adopted children of the person.'

The appellant in cassation lives in Belgium and works in Luxembourg. Accordingly, he is covered by EU legislation on the free movement of workers and their right to non-discrimination, direct or indirect, on grounds of nationality.

The child FW has been in foster care in the household of the appellant in cassation since 2005, pursuant to a Belgian court order. Under Article 269(1) of the Social Security Code, the rules governing entitlement to family allowances for a child living in Luxembourg and those for a child not living in Luxembourg are different.

A child living in Luxembourg has, in all cases, a direct right to the payment of family allowances, since Article 273(4) of the Social Security Code provides that *'in the case of a child placed in care by a court order, family allowance shall be paid to the natural or legal person who has custody of the child and with whom the child is officially resident and actually lives on a continuous basis'*.

In the case of a child who does not live in Luxembourg – as is the situation with the child FW, placed in care in the household of the appellant in cassation who lives in Belgium – the only right to family allowances is by virtue of the entitlement of *'members of the family'* of a frontier worker, defined in Article 270 of the Social Security Code as *'children born within marriage, children born outside marriage and adopted children of the person'*. The case of a child placed in care under a court order in the household of a person who does not live in Luxembourg is not covered by the code and therefore does not give rise to entitlements under national legislation.

In addition, it should be noted that, on the basis of Article 67 of Regulation (EC) No 883/2004, read in conjunction with Article 7(2) of Regulation (EU) No 492/2011 and Article 2(2) of Directive 2004/38, the Court of Justice of the European Union held, in its judgment of 2 April 2020 in Case C-802/18, that a child of a frontier worker, who is able to benefit indirectly from social advantages, means not only a child who has a child-parent relationship with that worker, but also a child of the spouse or registered partner of that worker, where that worker provides for the upkeep of that child, a matter which it is for the national courts to verify.

Whether this difference in treatment is compliant with EU law leads to the following question:

[...] [wording of the question to be referred for a preliminary ruling]

Before these proceedings can be continued, it is necessary to refer this question to the Court of Justice of the European Union for a preliminary ruling.

ON THESE GROUNDS,

the Court of Cassation

declares the three grounds of appeal to be inadmissible;

having regard to Article 267 of the Treaty on the Functioning of the European Union,

refers the following questions to the Court of Justice of the European Union for a preliminary ruling:

‘Do the principle of equal treatment guaranteed by Article 45 TFEU and by Article 7(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 and the provisions 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 and 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 No 883/2004 on the coordination of social security systems preclude provisions enacted by a Member State under which frontier workers may not receive a family allowance associated with their employment in that Member State for children placed in care with them under a court order, whereas any child placed in care under a court order and living in that Member State is entitled to receive that allowance which is paid to the natural or legal person who has custody of the child and with whom the child is officially resident and actually lives on a continuous basis? Does the answer to that question depend on whether the frontier worker provides for the upkeep of that child?’

[...]

[...] [stay of proceedings, costs, procedural references]