

Anonymised version

Translation

C-397/23 – 1

Case C-397/23

Request for a preliminary ruling

Date lodged:

29 June 2023

Referring court:

Sozialgericht Detmold (Germany)

Date of the decision to refer:

22 June 2023

Applicant:

FL

Defendant:

Jobcenter Arbeitplus Bielefeld

Sozialgericht Detmold (Social Court, Detmold)

...

Order

In the case of

FL, ... Bielefeld

applicant

...

v

Jobcenter Arbeitplus Bielefeld ...

defendant

Stadt Bielefeld Amt für soziale Leistungen – Sozialamt – ...

joined party

on 22 June 2023, the 35th Chamber of the Sozialgericht Detmold ... has made the following order:

- I. The proceedings are stayed.**
- II. The following question is referred to the Court of Justice of the European Union for a preliminary ruling pursuant to the first and second paragraphs of Article 267 of the Treaty on the Functioning of the European Union (TFEU):**

Is EU law to be interpreted as precluding a national rule under which a residence permit for the purpose of care and custody may be granted only to the foreign parent of an unmarried minor child resident in national territory if the parent has his or her habitual residence in national territory, which means that Union citizens of a Member State do not have such entitlement to the grant of a residence permit for the purpose of care and custody of a Union citizen who is a minor and a national of a Member State other than the host country?

Grounds:

...

A. Subject matter and facts of the main proceedings

I. Subject matter of the main proceedings

The parties are in dispute as to whether the applicant is entitled to social benefits under the Sozialgesetzbuch Zweites Buch (Book II of the Social Code, SGB II) or the Sozialgesetzbuch Zwölftes Buch (Book XII of the Social Code, SGB XII) for the period from 30 May 2020 to 28 February 2021. For such entitlement, it is necessary under the national provisions laid down in point 2(b) of the second sentence of Paragraph 7(1) of the SGB II and point 2 of the first sentence of Paragraph 23(3) of the SGB XII in the relevant versions that he or she has a right of residence which does not arise solely out of the search for employment.

II. Facts of the main proceedings

The applicant, who was born on 21 May 1979, is a Polish citizen. On 30 May 2020, he entered the Federal Republic of Germany from the Netherlands ... together with his non-marital partner. She had previously entered Germany from Poland on 30 August 2015 and stayed with a friend in the Netherlands for only a short period on account of an argument with her husband, who died on 25 March

2020. [The applicant's partner] is also a Polish citizen. On 27 November 2020, the couple's son ... was born outside marriage in Bielefeld. He too is a Polish citizen.

The applicant and [his partner and their son] applied to the defendant for benefits under the SGB II. By decisions of 3 December 2020 and 21 December 2020, the defendant approved [in respect of the partner] benefits under the SGB II for the period from entry on 30 May 2020. The defendant approved [in respect of the son] benefits for the period from his birth on 27 November 2020. ... By rejection decision of 21 April 2021, the defendant rejected the applicant's claim ... for the period at issue from 30 May 2020 to 28 February 2021. As grounds it stated that the applicant was not entitled to benefits under the SGB II because he only had a right of residence for purposes of the search for employment. There was no right of residence other than for purposes of the search for employment from which an entitlement to benefits under the SGB II could be derived. ... [explanation, see next paragraph]

The applicant lodged an administrative appeal against that decision in good time. By decision of 19 July 2021, the defendant dismissed the administrative appeal as unfounded. As grounds, it stated again that a right of residence did not arise from point 3 of the first sentence of Paragraph 28(1) of the Aufenthaltsgesetz (Gesetz über den Aufenthalt, die Erwerbstätigkeit und die Integration von Ausländern im Bundesgebiet (Law on the residence, gainful employment and integration of foreign nationals in federal territory)). [The partner] had been in the Federal Republic of Germany for more than five years and had a right of permanent residence. The applicant entered the Federal Republic of Germany for the first time on 30 May 2020. ... [Under national law the applicant did not have a right of residence as a family member or related person of his partner.] Furthermore, the right of residence also did not arise from the first sentence of Paragraph 11(14) of the Freizügigkeitsgesetz (Gesetz über die allgemeine Freizügigkeit von Unionsbürgern (Law on general freedom of movement of Union citizens), which refers to the Aufenthaltsgesetz in the provision cited) in conjunction with point 3 of the first sentence of Paragraph 28(1) of the Aufenthaltsgesetz because the right applies solely to minors who are German nationals and the applicant's son has only Polish nationality. Nor did a right of residence arise from the decision of the Court of Justice of the European Union in Case C-181/19 or Regulation (EU) No 492/2011 because the applicant's son was not of compulsory school age. Paragraph 28 of the Aufenthaltsgesetz could not be interpreted in the light of EU law, having regard to Article 4 of Regulation (EC) No 883/2004, as meaning that the unmarried father of a Union citizen who is not of compulsory school age must also enjoy a right of residence. The partner's right of freedom of movement and residence was not rendered materially impossible by the fact that the unmarried father did not receive any social benefits under the SGB II.

The applicant brought an action against that decision on 12 August 2021.

In the action, he claims in essence that a right of residence arises from point 3 of the first sentence of Paragraph 28(1) of the Aufenthaltsgesetz in conjunction with

Article 6 of the Grundgesetz (Basic Law, GG) and Article 8 of the European Convention on Human Rights (ECHR). Restricting the right to family reunification for the purpose of care and custody to ‘Germans’ is contrary to EU law and constitutes an unreasonable disadvantage and a restriction of freedom of movement. A right to equal treatment arises from the first sentence of Paragraph 11(14) of the Freizügigkeitsgesetz in conjunction with point 3 of the first sentence of Paragraph 28(1) of the Aufenthaltsgesetz, Article 6 of the GG and Article 8 of the ECHR.

The defendant and the joined party assert in the action that a right of residence cannot arise from point 3 of the first sentence of Paragraph 28(1) of the Aufenthaltsgesetz because, according to its wording, that provision is applicable only to ‘Germans’ and not to ‘Union citizens’. An inherent characteristic of national immigration and residence law is that a distinction is drawn between ‘Germans’ and ‘foreign nationals’. The provision in question does not infringe EU law. The question raised whether the non-grant of a residence permit for a Union citizen who lives in federal territory and has rights of care and custody over a minor child who enjoys the right of freedom of movement and is a citizen of a Member State constitutes discrimination is contentious in the case-law of the higher courts. Because of the inconsistent case-law of the higher courts and in the absence of a decision by a supreme court, it is not possible to alter the earlier decision and give partial recognition of the claim.

III. National legal framework

The relevant provisions of national law are as follows:

Paragraph 28 of the Aufenthaltsgesetz in the version of the Law of 27 July 2015 (BGBl. I p. 1386)

- (1) ¹A residence permit shall be granted to the foreign
1. spouse of a German,
 2. unmarried minor child of a German,
 3. parent of an unmarried minor German for the purpose of care and custody,
- if the German has his or her habitual residence in federal territory. ...

...

... [provisions governing specific aspects]

Paragraph 11 of the Freizügigkeitsgesetz in the version of the Law of 24 November 2020 (BGBl. I p. 2416), as amended by Article 1 of the Law of 12 November 2020

...

(14) ¹The Aufenthaltsgesetz shall also apply if it establishes a more favourable legal status than the present Law. ...

Paragraph 7 of the SGB II in the version of the Law of 30 November 2019 (BGBl. I p. 1948), applicable up to 31 December 2020

(1) ¹Benefits granted under this Book shall be received by persons

1. who have attained the age of 15 years and have not yet reached the age limit referred to in Paragraph 7a,
2. who are fit for work,
3. who are in need of assistance, and
4. whose habitual residence is in the Federal Republic of Germany (beneficiaries fit for work).

²The following shall be excluded:

1. foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Freizügigkeitsgesetz, and their family members, for the first three months of their residence,
2. foreign nationals
 - (a) who do not have a right of residence,
 - (b) whose right of residence arises solely out of the search for employment, or
 - (c) who derive their right of residence, exclusively or alongside a right of residence under point (b), from Article 10 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 (OJ 2011 L 141, p. 1), which was amended by Regulation (EU) 2016/589 (OJ 2016 L 107, p. 1),
and their family members,

...

... ⁴In derogation from point 2 of the second sentence, foreign nationals and their family members shall receive benefits granted under this Book if they have had their habitual residence in federal territory for at least five years; ...

...

Paragraph 7 of the SGB II, in the version of the Law of 9 December 2020 (BGBl. I p. 2855), applicable from 1 January 2021

Beneficiaries

(1) ...

...

... [identical to the version applicable up to 31 December 2020]

²The following shall be excluded:

1. foreign nationals who are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Freizügigkeitsgesetz, and their family members, for the first three months of their residence,

2. foreign nationals

(a) who do not have a right of residence, or

(b) whose right of residence arises solely out of the search for employment,

and their family members,

...

... [identical to the version applicable up to 31 December 2020]

...

Paragraph 23 of the SGB XII in the version of the Law of 22 December 2016 (BGBl. I p. 3155), applicable up to 31 December 2020

(1) ¹Subsistence assistance, assistance for sick persons, assistance for pregnant women, maternity assistance and care assistance under this Book shall be granted to foreign nationals who are actually resident in national territory. ²The provisions of the Fourth Chapter shall not be affected. ³Otherwise, social assistance may be granted in so far as it is justified in a particular case. ⁴The restrictions under the first sentence shall not apply to foreign nationals holding a permanent residence permit or a residence permit of limited duration who anticipate taking up permanent residence in federal territory. ⁵Legal provisions under which social assistance other than the benefits referred to in the first sentence must or should be granted shall not be affected.

(2) ...

(3) ¹Foreign nationals and their family members shall not receive benefits under subparagraph 1 or under the Fourth Chapter if

1. they are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Freizügigkeitsgesetz, for the first three months of their residence,

2. they do not have a right of residence or their right of residence arises solely out of the search for employment,

3. they derive their right of residence, exclusively or alongside a right of residence under point 2, from Article 10 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 (OJ 2011 L 141, p. 1), which was amended by Regulation (EU) 2016/589 (OJ 2016 L 107, p. 1), or

4. they entered in order to obtain social assistance.

...

... [limited assistance until departure, as a rule for a maximum of one month]

⁷In derogation from points 2 and 3 of the first sentence, foreign nationals and their family members shall receive benefits under the first and second sentences of subparagraph 1 if they have resided in federal territory for at least five years without significant interruption; ...

...

Paragraph 23 of the SGB XII, in the version of the Law of 9 December 2020 (BGBl. I p. 2855), applicable from 1 January 2021

...

... [identical to the version applicable up to 31 December 2020]

(3) ¹Foreign nationals and their family members shall not receive benefits under subparagraph 1 or under the Fourth Chapter if

1. they are not workers or self-employed persons in the Federal Republic of Germany and do not enjoy the right of freedom of movement under Paragraph 2(3) of the Freizügigkeitsgesetz, for the first three months of their residence,

2. they do not have a right of residence or their right of residence arises solely out of the search for employment, or

3. they entered in order to obtain social assistance.

...

... [limited assistance until departure, as a rule for a maximum of one month] ⁷In derogation from point 2 of the first sentence, foreign nationals and their family members shall receive benefits under the first and second sentences of subparagraph 1 if they have resided in federal territory for at least five years without significant interruption; ...

...

Article 8 of the ECHR ...

(1) Everyone has the right to respect for his private and family life ...

...

Article 6 of the GG ...

...

... [Protection of marriage and family, equal conditions for children born within marriage and children born outside marriage]

B. Reference and relevance to the decision of the questions referred for a preliminary ruling

It is true that, as a Sozialgericht (Social Court) of first instance, the Chamber is not obliged to carry out a preliminary ruling procedure because there are judicial remedies against decisions of the Sozialgerichte at the Landessozialgericht (Higher Social Court) and at the Bundessozialgericht (Federal Social Court). However, the Chamber considers it necessary to refer the proceedings at first instance, in order to accelerate the proceedings and to clarify the legal question which has been answered differently in the case-law of the higher courts, the Landessozialgerichte, so that it can be clarified in EU law whether such a national provision infringes Article 18 TFEU, Article 20, Article 21(2) and Article 33(1) of the Charter of Fundamental Rights of the European Union ('the Charter'), Regulation (EC) No 987/2009, Directive 2004/38/EC or other provisions of EU law taken into consideration by the Court.

The Chamber points out that there are significant differences in the interpretation of this legal question in the case-law of the higher national courts. ... [references to the case-law of the Sozialgerichte in which unlawful discrimination within the meaning of Article 18 TFEU is accepted or rejected; see the references in the order of the Bundesverfassungsgericht (Federal Constitutional Court)] The Bundesverfassungsgericht (BVerfG) also states that it is contentious in the case-law of the Landessozialgerichte and in legal literature whether the 11th sentence of Paragraph 11(1) of the Freizügigkeitsgesetz in the version applicable up to 23 November 2020 (since 24 November 2020: the first sentence of Paragraph 11(14) of the Freizügigkeitsgesetz) in conjunction with point 3 of the first sentence of Paragraph 28(1) of the Aufenthaltsgesetz and the first paragraph

of Article 18 TFEU can grant a right of residence to the parent, who has rights of care and custody, of a Union citizen who is a minor and enjoys the right of freedom of movement by virtue of accompanying the other parent pursuant to the first sentence of Paragraph 3(1) of the Freizügigkeitsgesetz (BVerfG, order of 4 October 2019 – 1 BvR 1710/18, [https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/DE/2019/10/rk20191004_1bvr171018.html] 2019, 27335, paragraph 12).

I. EU legal framework

In the view of the Chamber, the relevant provisions of EU law in the case at issue are: Article 18 TFEU, Article 20, Article 21(2) and Article 33(1) of the Charter, 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 and 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. In so far as the Court considers other provisions of EU law to be relevant, they should also be brought within the subject matter of the request for a preliminary ruling.

II. Relevance of the interpretation of European Union law for the main proceedings

The question referred for a preliminary ruling is legally relevant to the outcome of the proceedings. If the question were answered in the affirmative, the applicant ... would be entitled to benefits in principle, at least for the period from the birth of the couple's son on 27 November 2020. A material right of residence would arise from point 3 of the first sentence of Paragraph 28(1) of the Aufenthaltsgesetz, which constitutes a right of residence within the meaning of point 2(b) of the second sentence of Paragraph 7(1) of the SGB II and point 2 of the first sentence of Paragraph 23(3) of the SGB XII that does not arise solely out of the search for employment. The action in the proceedings at first instance would thus be partially successful on the basis of the present state of affairs and of the dispute. If the question is answered in the negative, the action would have to be dismissed on the basis of the present state of affairs and of the dispute. The dispute also has the connection with EU law which is necessary for the request for a preliminary ruling, as it concerns the conditions for receipt of social benefits by a Union citizen who, after moving to the Federal Republic of Germany, seeks, by relying on care and custody, equality with nationals and claims that the national rule is contrary to EU law.

Rights of appeal:

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