Case C-283/21

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:

4 May 2021

Referring court:

Landessozialgericht Nordrhein-Westfalen (Germany)

Date of the decision to refer:

23 April 2021

Applicant and appellant:

VA

Defendant and respondent:

Deutsche Rentenversicherung Bund

Subject matter of the main proceedings

Coordination of social security systems – Pension legislation – Regulation (EC) No 987/2009 – Article 44(2) – Taking into account of child-raising periods – Condition – Employment or self-employment

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

Interpretation of EU law, Article 267 TFEU

Questions referred for a preliminary ruling

1. Is under the legislation of the Netherlands – as the Member State which is competent under Title II of the basic Regulation [Regulation (EC) No 883/2004] – a child-raising period taken into account within the meaning of Article 44(2) of Regulation (EC) No 987/2009 by virtue of the fact that the period of child-raising in the Netherlands, as a pure period of residence, gives rise to a pension entitlement?

If Question 1 is answered in the negative:

2. Is [Article] 44(2) of Regulation (EC) No 987/2009 – following on from the judgments of the Court of Justice of the European Union of 23 November 2000 (Case C-135/99, [EU:C:2000:647], *Elsen*) and of 19 July 2012 (Case C-522/10, EU:C:2012:475, *Reichel-Albert*) – to be interpreted broadly as meaning that the competent Member State must also take into account the child-raising period if the person raising the child has completed pension-relevant periods before and after the child-raising due to education or employment only in the scheme of that State, but did not pay contributions into that scheme immediately before or after the child-raising?

Provisions of EU law relied on

Treaty on the Functioning of the European Union ('TFEU'), Article 21(1)

Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, Articles 5 and 11

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, Article 44

Provisions of national law relied on

Sozialgesetzbuch Sechstes Buch (Book VI of the Social Security Code, 'the SGB VI'), Paragraph 56(1), (3) and (5), Paragraph 57 and Paragraph 249

Succinct presentation of the facts and procedure in the main proceedings

1 The applicant, a German national born in 1958 in Aachen, Germany, lived from 1975 to 2010 in Vaals, a suburb of Aachen in the territory of the Netherlands. She went to school in Aachen, did a pre-study internship there – which was a prerequisite for admission to the vocational school of social pedagogy in Aachen – and was trained there as a state-certified educator. On 1 August 1978, she began a one-year professional traineeship in a kindergarten (probationary year). Normally, this year of recognition takes place in the context of employment subject to compulsory insurance. However, because there were not enough training places available, the applicant completed the professional traineeship without payment and thus exempt from pension insurance. After successfully completing her training as a state-certified educator, she obtained her advanced technical college certificate (vocational baccalaureate diploma) in 1979/80. Following this, she was not in employment subject to compulsory insurance in the profession for which she had trained. Due to the fact that she lived in the Netherlands, the employment

services in Germany could not find any employment for her. Her German education meant that she could not work as an educator in the Netherlands.

2 The applicant and her husband, the joined party, have two children whom they brought up together in Vaals. Due to her husband's occupation, the vast majority of the child-raising fell to the applicant. Both children went to school in Aachen throughout, particularly including the period from 1986 to 1999. From September 1993 to August 1995, the applicant ran her own children's boutique in Aachen. She did not pay contributions to the German pension insurance scheme in respect of this activity. From April 1999 to October 2012, the applicant engaged in minor employment in Germany that was not subject to compulsory insurance. On 1 February 2010, she moved from Vaals to Aachen. From October 2012, she was in employment subject to compulsory insurance in Germany. She has never been employed in the Netherlands. Both before and after the birth of the children, her husband was continuously engaged in employment subject to compulsory insurance in Germany.

3 On the sole basis of her periods of residence in the Netherlands from 13 February 1975 (after the age of 17) up to and including 1 February 2010, the applicant acquired, under Netherlands law, an entitlement to a Netherlands basic old-age pension (AOW) as a State pension benefit.

4 At the applicant's request, the defendant, as the competent German pension insurance institution, carried out a binding determination (registration) of the data contained in the applicant's insurance history up until 31 December 2007. The defendant did not take into account the period from 15 November 1986 to 31 March 1999 as a child-raising period or period to be taken into consideration for child-raising purposes because the applicant raised her children in another EU Member State, namely the Netherlands, during this period and was not pursuing an activity as an employed or self-employed person in Germany at the time when the period of child-raising began. The defendant recognised the period from 1 April 1999 to 1 June 1999 as a period to be taken into consideration for child-raising purposes in the case of the applicant's daughter, because the applicant was engaged in minor employment in Germany during this period (decision of 1 September 2014; decision on the opposition of 12 August 2015).

5 The Sozialgericht Aachen (Social Court, Aachen) dismissed the action brought against the failure to register the period from 15 November 1986 to 31 March 1999 as a child-raising period or period to be taken into consideration for child-raising purposes. It found that the child-raising carried out in the Netherlands could not be recognised under German law. Equal treatment of the child-raising periods on the basis of Article 44(2) of Regulation No 987/2009 is not possible since, at the time when her children were born or immediately before, the applicant was not pursuing an activity as an employed or self-employed person in Germany or under German law and paid no contributions to the German statutory pension insurance scheme on account of an activity as an employed or self-employed person. The fact that the applicant had completed periods (of residence)

under the Netherlands pension insurance scheme shows, on the contrary, that there is a close link between the applicant and the Netherlands social security system. Nor is there any gap in coverage. Taking pension-relevant periods into consideration twice is not part of the spirit and purpose of EU social law, which is geared towards coordination (judgment of 27 October 2016).

6 In her appeal, the applicant argued that, although she had resided in the Netherlands, her life – including the raising and care of her children – was focused on Germany as her centre of interest. She had therefore been arbitrarily placed at a disadvantage compared to a mother who had also brought up her children in a foreign country close to the border, but who had engaged in employment subject to compulsory social security contributions in the Federal Republic of Germany for at least one month before or during the child-raising or whose husband, during the child-raising periods, had been engaged in employment in the foreign country of residence that was subject to insurance in Germany. It is not appropriate to make a distinction according to whether there is a sufficiently close link between the parent raising the child and the pension system of the Federal Republic of Germany due to his or her own activity or whether that link is established by virtue of his or her spouse engaging in employment subject to compulsory social security contributions in Germany. The periods are not taken into account twice, since the periods during which pension rights of the same kind exist in Germany would be taken into account in a pension paid out by the Netherlands.

7 During the appeal proceedings, the defendant granted the applicant a pension for complete reduction in earning capacity as of 1 March 2018 in the amount of EUR 109.14 per month (decision of 18 February 2019). If the child-raising periods and periods to be taken into consideration for child-raising purposes at issue here which have not yet been taken into account were included, this pension would amount to EUR 349.02 per month.

8 In a benefit notification dated 20 August 2019, the Sociale Verzekeringsbank (SVB) of the Netherlands stated that the applicant had built up an AOW benefit of 70% on account of her periods of residence. If child-raising periods from the German statutory pension insurance scheme were taken into account, the Netherlands pension benefit would be reduced by 10%.

Succinct presentation of the reasoning in the request for a preliminary ruling

9 Under German law, there is no entitlement to a higher pension due to reduced earning capacity as of 1 March 2018 on the basis of the consideration of child-raising periods and periods to be taken into account in accordance with Paragraphs 56 and 57 of the SGB VI. The fact that the defendant, in its decision of 18 February 2019, did not credit the child-raising periods at issue here when determining the amount of the pension is not objectionable under national law alone. It is true that the applicant satisfies the conditions for crediting laid down in points 1 and 3 of the second sentence of Paragraph 56(1) of the SGB VI, since the

child-raising period is attributed to her and she is not excluded from the crediting. However, the (mere) fact that the child-raising was neither carried out on the territory of the Federal Republic of Germany nor treated as such child-raising in Germany means that the crediting is excluded (point 2 of the second sentence of Paragraph 56(1) in conjunction with Paragraph 56(3) of the SGB VI).

10 The fact that the applicant's two children were not brought up in Germany precludes crediting under the first sentence of Paragraph 56(3) of the SGB VI. Nor can crediting under the second sentence of Paragraph 56(3) of the SGB VI be applied, since, in order for this to be possible, the child-raising parent would have to have habitually resided abroad with his or her child and, during the period devoted to child-raising or immediately before the birth of the child, completed periods of compulsory contribution by virtue of an activity carried on there – that is abroad – as an employed or self-employed person. That is not the situation in the present case. Nor is crediting under the third sentence of Paragraph 56(3) possible. Under that provision, it is necessary that the applicant's husband had, during their joint residence abroad, periods of compulsory contribution under the German pension insurance scheme by virtue of an activity carried out abroad. That is not the case.

11 Since a child-raising period under Paragraph 56 of the SGB VI is not to be credited, a period to be taken into consideration for child-raising purposes within the meaning of Paragraph 57 of the SGB VI is also not applicable. In so far as the applicant pursued a more than minor self-employed activity in Germany in the period from September 1993 to August 1995, the right to the crediting of periods to be taken into consideration for child-raising purposes is excluded under the second sentence of Paragraph 57 of the SGB VI because no compulsory contributions were paid in this respect.

12 The outcome of the dispute depends on whether acknowledgement of the applicant's child-raising periods and the periods to be taken into consideration for child-raising purposes is the result of a broad interpretation of Article 44(2) of Regulation No 987/2009 in the light of the case-law of the Court of Justice to date relating to child-raising periods (in Germany).

13 In the present case, it is Article 44 of Regulation No 987/2009 which is materially applicable, since it contains special rules for the equal treatment of facts in the case of raising children abroad. Since the applicant, who lived with her children in the Netherlands during the period at issue, is not covered by Article 11(3)(a) to (d) of Regulation No 883/2004, the Netherlands is, in accordance with Article 11(3)(e) of that regulation, the 'competent Member State'. If the Netherlands does not take child-raising periods into account, the Federal Republic of Germany remains responsible. It is therefore necessary (first of all) to determine whether the Netherlands legislation 'does not take account' of child-raising periods within the meaning of that provision.

14 Under Article 44(1) of Regulation No 987/2009, the term 'child-raising period' covers any period which is credited under the pension legislation of a Member State or which provides a supplement to a pension explicitly for the reason that a person has raised a child, irrespective of the method used to calculate those periods and whether they accrue during the time of child-raising or are acknowledged retroactively. According to that provision, there must be either explicit crediting or a supplement to a pension precisely because of the raising of children as a pension-relevant situation, that is to say, a link to certain child-raising periods. It is necessary for child-raising periods to be taken into account as such and/or for the right to (higher) benefits to be provided for solely on the basis of the raising of children. The question, in this regard, is not whether, in practice, child-raising periods would indeed be approved; all that matters is that the legislation of the Member State provides, in principle, for child-raising periods to be taken into account when assessing the situation of the individual in question as regards pension rights (see also the Opinion of Advocate General Jääskinen of 1 March 2012 in *Reichel-Albert*, C-522/10, EU:C:2012:114, point 67).

15 Under the Netherlands pension scheme, child-raising periods are not explicitly credited as such nor do they give rise to a supplement or any other effect on entitlement to benefits within the meaning of Article 44(2) of Regulation No 987/2009. The Netherlands state pension under the Algemene Ouderdomswet (Netherlands law on general old age pensions, 'the AOW') is solely dependent on periods of residence or work in the Netherlands. Each resident accrues entitlement to 2% of a full AOW pension in each year he or she lives or works in the Netherlands. Anyone insured for 50 years under the AOW is entitled to receive an AOW pension in full. Since the applicant lived in the Netherlands for almost 35 years, she is accordingly entitled to an AOW pension of approximately 70%. Anyone who has completed the necessary periods of residence or work in the Netherlands and has reached the statutory retirement age is entitled to an AOW pension. Since the state pension is based only on the periods of residence or work completed in the Netherlands and not on child-raising periods as a pension-relevant situation, the present Chamber takes the view that the Netherlands pension scheme 'does not take account' of child-raising periods within the meaning of Article 44(1) and (2) of Regulation No 987/2009.

16 If the Court of Justice answers Question 1 in the negative, the Federal Republic of Germany, as the Member State whose legislation, according to Title II of Regulation No 883/2004, was applicable to the person concerned, is responsible in accordance with Article 44(2) of Regulation No 987/2009. The conditions for the application of Article 44(2) are not excluded, in the applicant's case, under paragraph 3 of that article, on the ground that she did not pursue an activity as an employed or self-employed person in the Netherlands.

17 According to its wording, the conditions for the application of Article 44(2) of Regulation No 987/2009 are not satisfied. That provision requires that the applicant was pursuing an activity as an employed or self-employed person at the date when, under German legislation, the child-raising period started to be taken

into account for the child concerned (that is at the time of the birth of her two children). That is not the situation in the present case. However, according to the case-law of the Court of Justice to date, the present Chamber takes the view that serious consideration should be given to applying Article 44(2) of Regulation No 987/2009 by extension, in a manner going beyond its wording, to situations in which insured persons who did not pursue a gainful activity as an employed or self-employed person before the birth of their children, but who did pursue, before the birth, an unpaid activity exempt from insurance as an employed person and, after the birth, an activity exempt from insurance as a self-employed person. It is necessary to determine whether those situations are also sufficient to conclude that there is a sufficiently close link between child-raising periods and periods of insurance in the German pension scheme, within the meaning of the case-law of the Court of Justice to date.

18 The present Chamber takes the view that there is good reason for such a broad interpretation, in the light of Article 21 TFEU, taking into account the case-law of the Court of Justice to date (judgment of 19 July 2012,*Reichel-Albert*, C-522/10, EU:C:2012:475, paragraphs 35 and 45).

19 If the cases previously decided by the Court of Justice are compared with the present case, it should be noted, as a significant difference, that, before transferring her residence abroad and, in particular, before the birth of her children, the applicant did not engage in any employment subject to compulsory insurance in the Federal Republic of Germany at all but only completed periods of training to be taken into account as regards pension rights (credit periods) before the birth of her children and, for several years after their birth, was not gainfully employed there at all. Nevertheless, it seems that there are also certain factors suggesting the existence of a sufficiently close link between child-raising periods and periods of insurance in the present case.

20 Such a link is borne out by the fact that the applicant's entire employment history was exclusively focused on the Federal Republic of Germany. The applicant attended school exclusively in Germany and successfully completed her training as a state-certified educator there; corresponding credit periods due to the (vocational) training were also noted in her insurance history. The year of recognition completed by the applicant in 1978/79 would ordinarily have been carried out in a paid capacity and thus subject to compulsory insurance. It was only (coincidentally) carried out without payment and thus exempt from insurance because at the time there were more applicants than posts for trainee educators at the place of training. The applicant could not find employment in the Netherlands because she was unable to provide evidence of the training required there. In Germany, she was unable to take up employment because she was referred to the employment services in her country of residence (the Netherlands). The other aspects of the applicant's life were also predominantly oriented towards the legal, economic and social system of Germany: her children attended school in Germany, so part of their upbringing inevitably took place in Germany. Her husband was engaged in employment subject to compulsory insurance exclusively

in Germany, before and after the birth of their common children. The applicant herself at no time pursued an activity as an employed or self-employed person in the Netherlands that was subject to compulsory insurance. However, from September 1993 to August 1995, she pursued an activity as a self-employed person in Germany that was exempt from insurance. From April 1999 to October 2012, she was engaged in minor employment not subject to compulsory insurance and from October 2012 she was in paid employment in Germany. The present Chamber does not disregard the fact that, unlike in the aforementioned cases previously decided by the Court of Justice, the applicant did not merely temporarily transfer her residence to another Member State, but lived there on a permanent basis. However, the present Chamber considers that this difference is not relevant. Instead, what matters is that the applicant's employment history shows her integration exclusively into the working or professional life of the Federal Republic of Germany. The adjudicating Chamber takes the view that it would be incompatible with the freedom of movement of citizens of the Union guaranteed by Article 21 TFEU if the child-raising periods or the periods to be taken into consideration for child-raising purposes were not taken into account solely because the applicant took up residence on Netherlands territory a few hundred metres from the border of the city of Aachen and the German national border.

21 The present Chamber takes the view that there is good reason to believe that the year of recognition completed – only coincidentally without payment and thus not subject to compulsory insurance – by the applicant before the birth of her children and the self-employed activity exempt from insurance pursued after the birth of her children, or the minor employment exempt from insurance taken into account by the defendant as of 1999, is enough to establish a sufficiently close link to the German pension insurance scheme. Parallel periods of residence in the Netherlands and child-raising periods in Germany are not taken into account twice (see also, in that regard, recital 12 of Regulation No 883/2004, according to which the overlapping of benefits of the same kind for the same period should be avoided). This is because, if child-raising periods are taken into account under German pension law, the applicant's old-age pension in the Netherlands will be reduced accordingly.