

**Case C-116/23**

**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:**

27 February 2023

**Referring court:**

Bundesverwaltungsgericht (Austria)

**Date of the decision to refer:**

23 February 2023

**Applicant:**

XXXX

**Defendant authority:**

Sozialministeriumservice (SMS), Landesstelle Steiermark

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**Subject matter of the main proceedings**

Care leave – Care leave allowance – Family hospice leave – Sickness benefit – Benefit for temporary absence from work – Prerequisite for claiming care allowance – Migrant workers – Discrimination

**Subject matter and legal basis of the request**

Interpretation of EU law, Article 267 TFEU

**Questions referred for a preliminary ruling**

1. Is the care leave allowance a sickness benefit within the meaning of Article 3 of Regulation (EC) No 883/2004 or, if not, another benefit under Article 3 of Regulation (EC) No 883/2004?

2. If it is deemed to be a sickness benefit, would the care leave allowance then be a cash benefit within the meaning of Article 21 of Regulation (EC) No 883/2004?

3. Is the care leave allowance a benefit for the caregiver or the person in need of care?

4. Consequently, does a situation in which an applicant for the care leave allowance, who is an Italian citizen, and has been permanently resident in Austria in the province of Upper Austria since 28 June 2013, and has also been continuously working in Austria in the same province with the same employer since 1 July 2013 (for which reason there is no indication that the applicant is a cross-border commuter), entered into an agreement with his employer to take care leave in order to care for his father, an Italian citizen who resided in Italy (Sassuolo), throughout the relevant period from 1 May 2022 to 13 June 2022 and applied to the defendant authority for a care leave allowance, fall within the scope of Regulation (EC) No 883/2004?

5. Does Article 7 of Regulation (EC) No 883/2004 or the prohibition of discrimination enshrined in various pieces of European legislation (e.g. Article 18 TFEU, Article 4 of Regulation (EC) No 883/2004, etc.) preclude a national provision that makes the payment of a care leave allowance conditional upon the person in need of care receiving an Austrian care allowance of level 3 or higher?

6. Does the EU law principle of effectiveness or the EU law principle of non-discrimination enshrined in various pieces of European legislation (e.g. Article 18 TFEU, Article 4 of Regulation (EC) No 883/2004, etc.) preclude, in a situation such as the present case, the application of national legislation or established national case-law that does not provide any scope to reclassify a ‘care leave allowance application’ as a ‘family hospice leave application’, when clearly a ‘care leave allowance application’ form was used rather than the ‘family hospice leave application’ form, and an agreement was clearly entered into with the employer that referred to ‘nursing care for a close relative’ instead of ‘end-of-life care’, although the underlying facts would – given that the father, who was in need of care, has subsequently passed away – in principle also satisfy the requirements for a care leave allowance under the header of ‘family hospice leave’ if only a different agreement had been entered into with the employer and a different application had been lodged with the authority?

7. Does Article 4 of Regulation (EC) No 883/2004 or another provision of European Union law (for example Article 7 of the Charter of Fundamental Rights) preclude a national provision (Paragraph 21c(1) of the Bundespflegegeldgesetz (Austrian Federal Care Allowance Act, ‘the BPGG’)) which makes the payment of care leave allowance conditional upon the person in need of care receiving an Austrian care allowance of level 3 or higher, whereas another national provision (Paragraph 21c(3) BPGG), when applied to the same facts, does not make the payment of the allowance conditional upon a similar requirement?

### **Provisions of European Union law relied on**

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

Charter of Fundamental Rights of the European Union

### **Provisions of national law relied on**

Arbeitsvertragsrechts-Anpassungsgesetz (Austrian Law amending the Law on employment contracts; 'the AVRAG'), Paragraphs 14a, 14c

Bundespflegegeldgesetz (Austrian Federal Law introducing a care allowance, 'the BPGG'), Paragraphs 3a, 21c, 21d

### **Succinct presentation of the facts and procedure in the main proceedings**

- 1 Mr XXXX, an Italian citizen who has been resident and working in Austria since 2013, entered into a leave of absence agreement with his employer in order to care for his father, who resided in Italy. Subsequently, on 10 May 2022, he applied to the defendant authority Sozialministeriumservice, Landesstelle Steiermark (Department of the Ministry of Social Affairs (SMS), Styria Regional Office) for a care leave allowance.
- 2 This application was dismissed by the defendant authority by decision dated 7 June 2022 on the grounds that the care leave allowance would only be portable to the EEA or Switzerland if the person in need of care were resident in one of these countries and received a care allowance under the BPGG, as Austria would then be responsible for the payment of sickness benefits within the meaning of Regulation (EC) No 883/2004. According to that decision, since the applicant's father did not receive any Austrian care allowance, there was no entitlement to care leave allowance.
- 3 In observance of the prescribed period, the applicant lodged an objection against this decision on 7 July 2022, in which he applied for the care leave allowance in the amount provided for by law for the period from 10 May 2022 to 13 June 2022. He stated that his father had been dependent on 24-hour-a-day care during the period in respect of which the care leave allowance had been applied for and had received a care allowance in Italy equivalent to the level-3 care allowance in Austria. According to the applicant, the legal opinion of the defendant authority according to which the care leave allowance is an ancillary benefit which, in cases having a connection to other European countries, a caregiver working in Austria is only entitled to if the person to be cared for is entitled to an Austrian care allowance, is incomprehensible. After all, the care allowance is applied for by and paid to the person in need of care, whereas the care leave allowance is applied for by and paid to the caregiver. The care leave allowance is intended to provide the

caregiver with security under social and labour law, which is why the caregiver's place of work is a crucial factor.

- 4 The applicant also argued that the care leave allowance should be regarded as a sickness benefit under European law and that, under Article 11(3)(a) of Regulation (EC) No 883/2004, Austrian law was applicable since he was employed in Austria. According to the applicant, this social security benefit is portable. Moreover, he contended that Paragraph 21c(3) BPGG also does not require that the person in need of care has to be covered by health insurance in Austria. According to the case-law of the Court of Justice of the European Union, benefits such as a care allowance are to be classified as 'sickness benefits'. According to the applicant, the defendant authority's interpretation infringes the freedom of movement for workers within the European Union, since it is almost exclusively EU citizens without Austrian nationality who have parents in need of care outside Austria, and it is therefore only those citizens who do not receive a care leave allowance. In the present case, the applicant had taken care leave pursuant to Paragraph 14c AVRAG, which is why he was entitled to a care leave allowance for the period from 10 May 2022 to 13 June 2022 (14 days after the death of his father on 29 May 2022).
- 5 On 31 August 2022, the referring court, the Bundesverwaltungsgericht (Federal Administrative Court), heard the defendant authority. In this context, the court incorrectly stated that it was a matter of family hospice leave (instead of, more correctly, care leave) and that the national law provision on family hospice leave did not require that the person in need of care be covered by health insurance in Austria. The court therefore did not share the view of the defendant authority that the care leave allowance was a benefit for the person being cared for that was ancillary to the care allowance.
- 6 The defendant authority subsequently submitted a statement dated 20 September 2022, in which it clarified that the applicant had not applied for family hospice leave, and therefore no application for a care leave allowance in connection with family hospice leave had been rejected. It also stated that the receipt of an Austrian care allowance of level 3 or higher was a prerequisite for any entitlement to care leave. As the applicant's father did not receive any care allowance in Austria, the applicant's application for a care leave allowance in connection with care leave had been rejected.

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

- 7 The parties to the proceedings agree that the care leave allowance in this case is to be classified as a sickness benefit.
- 8 However, in the view of the referring court, the care leave allowance could also be deemed to be a benefit for a temporary absence from work, which would have to be treated like an unemployment benefit, since the employment relationship

undergoes a change or is put on hold and the benefit is calculated on the basis of unemployment insurance rules.

- 9 On the question of the distinction between cash benefits and benefits in kind, the Court of Justice of the European Union has already clarified that benefits paid directly to the caregiver (instead of to the person in need of care) are also deemed to be sickness benefits within the meaning of Regulation (EC) No 883/2004. The benefit in question could therefore be considered to ultimately benefit the person in need of care. As proof of use is required due to the granting of the benefit to the caregiver, the care leave allowance would have to be classified as a benefit in kind. If that view were to be followed, the care leave allowance would be payable only in respect of care provided to a person in Austria (and would therefore not be payable if the recipient of an Austrian care allowance resided in another Member State). However, this benefit would then also have to be granted, against reimbursement of costs by the competent foreign institution, for the care of a person insured in another Member State if that person resided in Austria.
- 10 As yet, the Administrative Commission for the Coordination of Social Security Systems does not share the Austrian view that the care leave allowance is a care benefit in kind.
- 11 Another possibility would be to regard this benefit as a benefit that is not covered by Regulation (EC) No 883/2004 and to focus on the labour-law connection of the caregiver. This benefit would thus always have to be granted if the caregiver fulfils the requirements of Paragraph 21c(1) BPGG, irrespective of the place of residence of the person in need of care. In this case, however, an entitlement to the benefit would be precluded if the person in need of care lived in Austria and received an Austrian care allowance, but the caregiver were employed in another Member State and took leave of absence from employment in that Member State, or agreed on a suspension of his/her employment with his/her employer that was comparable to Austrian care leave.
- 12 Furthermore, the proof of use required by Paragraph 21d(2)(4) BPGG could be an indication that this is a benefit in kind, if proceeding on the assumption that this is a benefit that inures to the benefit of the person in need of care.
- 13 Question 3 seeks to ascertain whether the relevant Member State is required to provide a benefit to the caregiver or the person in need of care. If a Member State had to pay in both cases, this would necessarily lead to an unintended accumulation of entitlements, which is why this possibility has been excluded by the referring court. The obligation to pay a benefit can therefore only relate to one person. If the caregiver is the decisive factor, this gives rise once again to the question of the nature of the benefit (question 1), as the caregiver does not qualify for a sickness benefit.
- 14 Question 4 seeks to clarify whether the fact that the applicant came to Austria almost 10 years ago, exercising his freedom of movement, has any bearing on the

application of Regulation (EC) No 883/2004, and whether therefore the refusal to grant the benefit does not constitute any impediment to the exercise of the right to free movement. In addition, it must be clarified whether it is relevant that the family member concerned resides in another Member State and has never exercised his right to freedom of movement.

- 15 Question 5 relates to the receipt of an Austrian care allowance, of level 3 or higher, by the person in need of care. As a matter of principle, the care allowance is available to Austrian citizens or EEA citizens if they have their habitual abode in Austria. Naturally, it is easier for nationals to fulfil this criterion than it is for non-citizens, such as the applicant's father, who resided in Italy. Migrant workers are therefore more affected by the nexus between the care leave allowance and the receipt of the Austrian care allowance than Austrian nationals, whose family members usually have their habitual abode in Austria. This would indicate discrimination based on nationality or domicile.
- 16 In the view of the referring court, the care leave allowance would be granted in the present case, in line with current Austrian practice, if the applicant's father resided in Italy but received an Austrian pension and was therefore covered by health insurance in Austria and entitled to Austrian care allowance in Italy. With regard to the care leave allowance, the defendant authority takes the view that this is classified as a benefit for the person in need of care and therefore grants this allowance if Austria is obligated in relation to the person in need of care. However, the referring court doubts that this is permissible. If it is permissible, the referring court would like to know whether it is permissible for the defendant authority to base its decision on the level-3 Austrian care allowance. However, even assuming that it is a benefit for the caregiver and that, by virtue of the equivalent treatment of facts in accordance with Article 5 of Regulation (EC) No 883/2004, it would have to be treated as an equivalent foreign benefit, the question arises whether the degree of seriousness of the illness of the person in need of care abroad must be comparable to what is necessary in Austria in order to receive the level-3 care allowance.
- 17 Questions 6 and 7: According to the case-law of the Verwaltungsgerichtshof (Supreme Administrative Court), due to the duty of care incumbent on a public authority, it must be assumed that the social security institution must work towards an (effective) application that takes into account the legal interests of the applicants. When assessing applications, social security institutions must proceed in the spirit of a social application of the law: in cases of doubt, they must therefore interpret applications in favour of the insured person. If there are any doubts with regard to the applicant's intention, his or her intention needs to be clarified (e.g. by way of an interview). That said, the insured person may not be awarded any benefit other than the one he/she has unequivocally applied for.
- 18 However, the defendant authority is not a social security institution and therefore not required to assess claims in the spirit of a social application of the law. Since the applicant agreed with his employer care leave pursuant to Paragraph 14c

AVRAG and filled out the form to apply for a care leave allowance pursuant to Paragraph 21c(1) BPGG and not the form to apply for a care leave allowance based on family hospice leave pursuant to Paragraph 21c(3) BPGG, according to national case-law he cannot be awarded any benefit other than the one he unequivocally applied for.

- 19 The relevant question therefore seems pertinent, given that, in view of the facts of the present case, the applicant would also fulfil the criteria for a care leave allowance based on family hospice leave pursuant to Paragraph 21c(3) BPGG, if he had lodged the correct applications. However, as a provision of national law, Paragraph 21c(3) BPGG is more favourable than the applicable national provision of Paragraph 21c(1) BPGG, as Paragraph 21c(3) BPGG is not linked to the granting of an Austrian care allowance, of level 3 or higher, for the person needing care.
- 20 Article 4 of Regulation (EC) No 883/2004 stipulates equal treatment. Although the situation at issue falls within the scope of two differing national provisions whose application depends on the will of the applicant, the nature of the agreement concluded with his employer and the application form used, it is conceivable that this is a case of discrimination.

WORKING DOCUMENT