

Case C-576/20**Request for a preliminary ruling****Date lodged:**

4 November 2020

Referring court or tribunal:

Oberster Gerichtshof (Austria)

Date of the decision to refer:

13 October 2020

Applicant:

CC

Defendant:

Pensionsversicherungsanstalt

The Oberster Gerichtshof (Supreme Court, Austria), sitting as the court dealing with appeals on points of law (*Revision*) in matters of labour and social law [...], in the social law case of the applicant CC, [...], regarding an old-age pension (*Alterspension*), following the appeal on a point of law brought by the applicant against the judgment of 26 May 2020 of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), sitting as the court dealing with appeals on the merits in matters of labour and social law, [...] by which the judgment of the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna, Austria) of 26 March 2019 [...] was confirmed, has made, in closed session, the following

O r d e r:

A. The following question is referred to the Court of Justice of the European Union for a preliminary ruling: **[Or. 2]**

1. Is Article 44(2) 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 to be interpreted as precluding child-raising periods spent in other Member States from being taken into account by a Member State competent to grant an old-age pension – under whose legislation the applicant for a pension has

pursued an activity as an employed or self-employed person throughout her working life, with the exception of those child-raising periods – solely on the ground that the applicant for a pension was not pursuing an activity as an employed or self-employed person at the date when, under the legislation of that Member State, the child-raising period started to be taken into account for the child concerned?

If the first question is answered in the negative:

2. Is the first clause of Article 44(2) 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 to be interpreted as meaning that, under its legislation, the Member State which is competent under Title II of Regulation (EC) No 883/2004 on the coordination of social security systems does not take child-raising periods into account generally, or that it does not take them into account only in a specific case?

B. [...] **[Or. 3]** [...] [stay of proceedings]

Grounds:

[1] **I. Subject matter of the proceedings and facts:**

[2] Ms CC was born in 1957. From 4 October 1976 to 28 August 1977, she acquired 11 months of compulsory insurance contributions as an apprentice in Austria. After her studies, she acquired a further 57 months of compulsory insurance contributions on the basis of her self-employment in Austria from 1 January 1982 to 30 September 1986.

[3] From October 1986, Ms CC went to the United Kingdom and continued her studies there. She moved to Belgium at the beginning of November 1987. In Belgium, she gave birth to a son on 5 December 1987 and another son on 23 February 1990. She then stayed together with the children in Belgium at first, then in Hungary from 5 December 1991 to 31 December 1991 and finally in the United Kingdom from 1 January 1993 to 8 February 1993. Ms CC looked after and brought up her children from 5 December 1987 to 8 February 1993. She was not in gainful employment and did not complete any periods of insurance for the purposes of pension insurance in the United Kingdom, Belgium or Hungary. Nor did Ms CC receive any benefits for bringing up or looking after children during that period.

[4] On 8 February 1993, Ms CC returned to Austria, where she was subsequently employed and self-employed and completed periods of insurance for the purposes of pension insurance on the basis of her employment until October 2017.

[5] **II. Basis in EU law: [Or. 4]**

- [6] 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 ('Implementing Regulation 987/2009');

'Article 44

Taking into account of child raising-periods

1. For the purposes of this Article, "child-raising period" refers to 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.

2. Where, under the legislation of the Member State which is competent under Title II of the basic Regulation, no child-raising period is taken into account, the institution of the Member State whose legislation, according to Title II of the basic Regulation, was applicable to the person concerned on the grounds that he or she was pursuing an activity as an employed or self-employed person at the date when, under that legislation, the child-raising period started to be taken into account for the child concerned, shall remain responsible for taking into account that period as a child-raising period under its own legislation, as if such child-raising took place in its own territory.

3. Paragraph 2 shall not apply if the person concerned is, or becomes, subject to the legislation of another Member State due to the pursuit of an employed or self-employed activity.'

- [7] **III. National law:**

- [8] A) Allgemeines Pensionsgesetz (General Law on Pensions), BGBl I 2004/142 ('the APG'):

'Old-age pension, Entitlement

Paragraph 4 (1) An insured person shall be entitled to an old-age pension on attaining the age of 65 years (the normal retirement age) where, by the reference date (Paragraph 223(2) of the Allgemeines Sozialversicherungsgesetz [General Law on Social Security, 'the ASVG']), at least 180 insurance months have been completed under this or another federal law, of which **[Or. 5]** at least 84 were obtained by reason of the pursuit of an activity (minimum insurance period). ...

Old-age pension, Amount

Paragraph 5 (1) The amount of the monthly gross benefit is calculated – notwithstanding a special supplementary allowance pursuant to

Paragraph 248(1) ASVG, Paragraph 141(1) of the Gewerbliches Sozialversicherungsgesetz (Law on social insurance for persons engaged in trade and commerce, ‘the GSVG’) and Paragraph 132(1) of the Bauern-Sozialversicherungsgesetz (Law on social insurance for farmers, ‘the BSVG’) – from the total credit (point 5 of Paragraph 11) determined as at the material date (Paragraph 223(2) ASVG) divided by 14. ...

Paragraph 16 ... (3a) *Substitute qualifying periods spent in raising children pursuant to Paragraph 227a ASVG, Paragraph 116a GSVG and Paragraph 107a BSVG which were acquired before 1 January 2005 shall also be deemed to be insurance months for the purpose of fulfilling the minimum insurance period pursuant to Paragraph 4(1).*

(6) In derogation from Paragraph 4(1), the retirement age for female insured persons who attain the age of 60 years before 1 January 2024 shall be determined in accordance with Paragraph 253(1) ASVG (Paragraph 130(1) GSVG, Paragraph 121(1) BSVG); ...’

- [9] B) Allgemeines Sozialversicherungsgesetz (General Law on Social Security), BGBI 1955/189 (‘the ASVG’):

‘Periods of insurance

Paragraph 224. *Periods of insurance shall be understood to mean the contribution periods referred to in Paragraphs 225 and 226 and the substitute qualifying periods referred to in Paragraphs 227, 227a, 228, 228a and 229.*

...

Substitute qualifying periods spent in raising children from the period after 31 December 1955 and before 1 January 2005

Paragraph 227a. *(1) In addition, where an insured person has actually been the person primarily responsible for rearing her (his) child (subparagraph 2), such child-rearing in the country, up to a maximum of 48 calendar months from the birth of the child, shall constitute a substitute qualifying period after 31 December 1955 and before 1 January 2005 in the class of pension insurance within which the last preceding contribution period falls or, where no such period exists, within which the next following contribution period falls. In the event of a multiple birth, the 48-calendar-month period is extended to 60 calendar months.*

(2) The following are deemed to be children within the meaning of subparagraph 1:

1. the children of the insured person;

...

(3) Where the birth (adoption, taking over the care of the child for no remuneration) of an additional child occurs before the expiry of the [Or. 6] 48-calendar-month period (60 calendar-month-period), it shall extend only until that additional birth (adoption, taking over the care of the child for no remuneration); ...

(4) Entitlement in respect of one and the same child during the respective periods shall exist only for the person who has actually and primarily brought up the child. ...

...

(8) For each substitute qualifying month spent bringing up an adopted child or foster child (points 5 and 6 of subparagraph 2), a contribution amounting to 22.8% of the contribution basis shall be paid using resources from the equalisation fund for family allowances. The contribution basis for the calendar day is the amount pursuant to Paragraph 76b(4) in the version applicable on 31 December 2014.'

[10] Paragraph 116a GSVG is essentially a parallel provision of Paragraph 227a ASVG.

[11] **IV. Arguments of the parties and forms of order sought:**

[12] On 11 October 2017, Ms CC applied to the Pensionsversicherungsanstalt (Pension Insurance Institution, 'the PVA') for the award of an old-age pension.

[13] By decision of 29 December 2017, the PVA granted Ms CC an old-age pension of EUR 1 079.15 per month from 1 November 2017. The PVA based the calculation of the pension on 366 insurance months completed in Austria, including 14 months of substitute qualifying periods spent in raising children from January 1993 to February 1994.

[14] By her action against that decision, Ms CC seeks the award of a higher old-age pension. She submits that, for the purpose of calculating that pension, the periods spent bringing up children in the United Kingdom, Belgium and Hungary (Member States) from 5 December 1987 to 31 January 1993 (62 months) should also be taken into account as substitute qualifying periods. **[Or. 7]**

[15] The PVA contended that foreign child-raising periods cannot be taken into account under Article 44 of Implementing Regulation 987/2009, because Ms CC had not been in gainful employment immediately before she began to bring up her children, and the children had been brought up in Member States that do in principle provide for the crediting of child-raising periods.

[16] **V. Procedure to date:**

[17] The court of first instance (Labour and Social Court, Vienna) dismissed the claim, because the conditions laid down in Article 44 of Implementing Regulation 987/2009 for the crediting of child-raising periods in another Member State were not met.

[18] The court of second instance (Higher Regional Court, Vienna) upheld that judgment. It took the legal view that Article 44 of Implementing Regulation 987/2009 constitutes a restriction of the free movement of Union citizens that is permitted under Article 21 TFEU.

[19] Ms CC lodged an appeal on a point of law (*Revision*) against that decision with the Supreme Court. She requests that her action be upheld. The PVA did not participate in the appeal proceedings.

[20] **VI. Reasons for the question referred:**

[21] First question:

[22] It follows from Article 97 of Implementing Regulation 987/2009 and Article 91 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 ('Regulation 883/2004') that those regulations were already in **[Or. 8]** force both at the time of the application for the award of an old-age pension (11 October 2017) and at the time of the contested decision of the PVA (29 December 2017). The Supreme Court takes the view that they are therefore applicable *ratione temporis* to the present case (CJEU, C-522/10, *Reichel-Albert*, ECLI:EU:C:2012:475, paragraph 26 et seq.). It follows from Articles 2(1) and 3(1)(d) of Regulation 883/2004 that Ms CC falls within the personal and material scope of that regulation.

[23] The Labour and Social Court, Vienna, correctly held that January 1993 – when Ms CC stayed in the United Kingdom with her sons before returning to Austria, where she was employed from February 1993 – was recognised by the PVA as a substitute qualifying period spent in raising children under the ASVG. In essence, therefore, it is the child-raising periods completed by Ms CC in Belgium (and one month in Hungary) from December 1987 to December 1992 that are of importance for the proceedings. Regulation 883/2004 was not yet applicable in that period; rather, its predecessor, Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community ('Regulation 1408/71'), was applicable. However, the Supreme Court takes the view that, pursuant to Article 87(2) and (3) of Regulation 883/2004, those periods must be taken into consideration for the purposes of determining Ms CC's rights to benefit (likewise regarding Article 94(2) and (3) of Regulation 1408/71, CJEU, C-28/00, *Kauer*, ECLI:EU:C:2002:82, paragraphs 22 to 24).

[24] In order for it to be possible in the present case to establish that Austria is competent at all to take the child-raising periods completed by Ms CC in Belgium

and Hungary into account for the purposes of her entitlement to an old-age [Or. 9] pension, the conditions laid down in Article 44 of Implementing Regulation 987/2009 must be met (see, in that regard, Opinion of Advocate General Jääskinen in Case C-522/10, *Reichel-Albert*, ECLI:EU:C:2012:114, point 62 et seq.). The condition laid down in Article 44(3) of Implementing Regulation 987/2009 is not met, because Ms CC did not pursue an activity as an employed or self-employed person in either Belgium or Hungary. Even assuming that neither Belgium nor Hungary (as the competent Member States of residence pursuant to Article 11(3)(e) of Regulation 883/2004) take child-raising periods into account (first sentence of Article 44(2) of Implementing Regulation 987/2009) in the present case, Austria would still not have secondary competence under the second sentence of Article 44(2) of Implementing Regulation 987/2009, because Ms CC did not pursue an activity as either an employed or self-employed person in Austria in December 1987 (being the point when the child-raising period for her first son started to be taken into account).

[25] The Supreme Court is therefore faced with a question on the interpretation of Article 44 of Implementing Regulation 987/2009, which must be referred to the Court of Justice of the European Union for a preliminary ruling.

[26] *Possible infringement of primary law:*

[27] Article 21 TFEU grants Union citizens the right to move freely within the territory of the Member States, subject to the limitations and conditions laid down in the Treaties and by the provisions adopted to give them effect.

[28] Article 44 of Implementing Regulation 987/2009 was introduced by the EU legislature in response to the case-law of the Court of Justice in the *Elsen* (CJEU, C-135/99, ECLI:EU:C:2000:647) [Or. 10] and *Kauer* cases, the scope of which should be circumscribed (recital 14 of Implementing Regulation 987/2009, Opinion of Advocate General Jääskinen, ECLI:EU:C:2012:114, point 3). That provision may well be regarded as an implementing provision that restricts the right to freedom of movement under Article 21 TFEU in a permissible manner. This is apparent solely from the fact that the purpose of Regulation 883/2004 and Implementing Regulation 987/2009 is not harmonisation or even approximation, but merely coordination of the social security systems set up by the Member States; insured persons cannot demand that their move to another Member State should not affect the nature or level of the benefit to which they were entitled in their home country (CJEU, C-134/18, *Vester*, ECLI:EU:C:2019:212, inter alia paragraph 32). Furthermore, pursuant to Article 1(t) of Regulation 883/2004, the question of which periods are to be recognised as periods of insurance and what quality they possess is always governed by the law of the State in which those periods are completed (CJEU, C-548/11, *Mulders*, ECLI:EU:C:2013:249, paragraph 37).

[29] However, the fact that Ms CC – like Mrs Kauer, in particular – worked and completed insurance periods only in Austria militates against that, meaning that it

could be argued that that circumstance may create a sufficiently close link with the Austrian social security system for reasons of primary law (ECLI:EU:C:2002:82, paragraph 32; ECLI:EU:C:2012:114, point 35). Although the facts of the present case differ from those in the *Kauer* case – because, unlike Mrs Kauer, Ms CC was no longer in Austria when her children were born – the facts of the present case are comparable to those in the *Reichel-Albert* [Or. 11] case. It is true that the Court of Justice ruled on that case on the basis of Regulation 1408/71, which did not contain any provision comparable to Article 44 of Regulation 883/2004. However, it emphasised the primary-law basis of its decision, in particular by stating that the rule of jurisdiction in Article 13(2)(f) of Regulation 1408/71 (see now: Article 11(3)(e) of Regulation 883/2004), which was not created until 1991 and was therefore not yet applicable, and according to which Belgium was the competent State as the State of residence during the child-raising periods, could do nothing to change the sufficiently close link between Mrs *Reichel-Albert* and the German social security system – a link which must be said to have existed.

- [30] *Possible infringement of the principle of the protection of legitimate expectations under EU law:*
- [31] Since Regulation 1408/71 did not contain any rules comparable to Article 44 of Regulation 883/2004 and Ms CC completed the child-raising periods within the temporal scope of that regulation, an initial examination indicates – in the light of the Court of Justice’s case-law set out above – that there are also substantial grounds in the present case that militate in favour of classifying Belgian and Hungarian child-raising periods as child-raising periods to be examined under Austrian law, because, within the scope of Regulation 1408/71, it would have to be assumed that there is a sufficiently close link between Ms CC and the Austrian social security system. In this respect, Ms CC’s situation would have deteriorated after the entry into force of Article 44 of Implementing Regulation 987/2009 on 1 May 2010, that is long after she completed the child-raising periods.
- [32] The Court of Justice has consistently held that the principle of the protection of legitimate expectations forms part of the [Or. 12] Union legal order and must be observed by the Member States when they exercise the powers conferred on them by Union directives (CJEU, C-62/00, *Marks & Spencer*, ECLI:EU:C:2002:435, paragraph 44). Although it is, as a general rule, consistent with that principle for new rules to apply to the future consequences of situations which arose under the earlier rules, a legislative amendment retroactively depriving a beneficiary of a right he has derived from earlier legislation is incompatible with that principle (CJEU, C-107/10, *Enel Maritsa Iztok 3*, ECLI:EU:C:2011:298, paragraph 39). Accordingly, the substantive rules of EU law must be interpreted as applying to situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them (CJEU, C-334/07 P, *Commission v Freistaat Sachsen*, ECLI:EU:C:2008:709, paragraph 44).

[33] The Supreme Court does not fail to recognise that Article 44 of Implementing Regulation 987/2009 may well be consistent with the principle of the protection of legitimate expectations, because that provision governs (only) future consequences – acquisition and amount of an old-age pension – of child raising-periods completed before it entered into force. However, Ms CC only ever paid contributions to the Austrian social security system and worked only in Austria. There was already a sufficiently close link to the Austrian social security system when Article 44 of Implementing Regulation 987/2009 entered into force. The Supreme Court therefore takes the view that Ms CC may have had legitimate expectations that are encroached upon by Article 44 of Implementing Regulation 987/2009 in a manner that infringes the [Or. 13] principle of the protection of legitimate expectations.

[34] *Second question:*

[35] The PVA asserted that Ms CC had completed her child-raising periods in States that do in principle provide for the crediting of child-raising periods. There are not yet any results from previous procedures in this regard. If the first question is answered in the negative, the further question arises as to what the first clause of Article 44(2) of Implementing Regulation 987/2009 means when it provides that no child-raising period is ‘taken into account’ by the Member State which is competent under the provisions of Title II of Regulation 883/2004. On the one hand, this could be understood to mean that that Member State does not take child-raising periods into account in a specific individual case, or that it generally does not recognise child-raising periods in its catalogue of pension insurance periods (Opinion of Advocate General Jääskinen, ECLI:EU:C:2012:114, point 67).

[36] **VII. Stay of proceedings:**

[37] [...] [procedural law matters]

[...] Vienna, 13 October 2020

[...]