

Case C-323/23**Request for a preliminary ruling****Date lodged:**

25 May 2023

Referring court:

Oberster Gerichtshof (Supreme Court, Austria)

Date of the order for reference:

16 May 2023

Appellant:

DS

Respondent:

Pensionsversicherungsanstalt

10 Obs 139/22x

REPUBLIC OF AUSTRIA

OBERSTER GERICHTSHOF (SUPREME COURT)

The Oberster Gerichtshof (Supreme Court), sitting as an appellate court dealing with questions of law in labour and social law cases ..., in the social law case brought by the appellant, D* S* ..., against the respondent, Pensionsversicherungsanstalt, 1021 Wien, ..., on the matter of a compensatory supplement (*Ausgleichszulage*), issued – in response to the appellant’s appeal on a point of law (*Revision*) against the judgment dated 15 September 2022 of the Oberlandesgericht Wien (Higher Regional Court, Vienna, Austria), adjudicating as a court of appeal dealing with questions of fact and law in labour and social law cases, GZ 10 Rs 22/22m-62, by which that court upheld the judgment of the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna, Austria) of 1 February 2022, GZ 25 Cgs 60/20a-56 – the following

Decision

in closed session:

A. The following question is referred to the Court of Justice of the European Union ('CJEU') for a preliminary ruling:

Is Article 7 of 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 amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC ('the Union Citizens Directive'), to be interpreted as meaning that an economically inactive citizen of the European Union may not be a burden on the social assistance system within the meaning of the Union Citizens Directive, if he resides in the host Member State for more than three months, but for less than five years, and derives his right of residence only from his capacity as the spouse (Article 2(2)(a) of the Union Citizens Directive) of a European Union citizen employed in the host Member State (migrant worker) (Article 7(1)(d) of the Union Citizens Directive), but does not himself have an original right of residence under Article 7(1)(a), (b) or (c) of the Union Citizens Directive?

... [procedural law matters]

Grounds:

I. Subject matter of the proceedings and facts:

- 1 Mr DS is a Romanian national. He is married to a Romanian national and has a minor son. Mr DS came to Austria together with his wife in the summer of 2017, where he has been living permanently since 8 August 2017. Mr DS maintains that the move was motivated by health problems and a desire to obtain better medical care in Austria. He has been drawing a Romanian pension for more than ten years (the equivalent of approximately EUR 50 net per month). Mr DS has recently been seeking work. He receives the means-tested minimum income (*bedarfsorientierte Mindestsicherung*) in Austria.
- 2 His wife was employed in Austria from 3 July 2017 until 2 April 2020 and earned between EUR 1,200 and EUR 1,500 net. She was then unemployed, (without receiving unemployment benefits), until 13 July 2020; from 14 July 2020 until 1 December 2020 she was employed again as a cleaner for a similar wage, and then received unemployment benefits from 13 November 2020 until 20 December 2020. From 17 December 2020 until 1 April 2021, she was in minor employment (*geringfügige Beschäftigung*). She has been working for her first employer again since 1 July 2021.
- 3 Mr DS initially lived in a rented flat with his wife and son. His wife paid the monthly rent of approximately EUR 420. Since the autumn of 2020, the married couple have been living separately. Divorce proceedings are pending but have not been concluded. Since 25 October 2021, Mr DS has been living in another rental

flat and, since December 2021, he has been unable to pay the monthly rent of EUR 380. Mr DS is unable to make any meaningful contribution towards the maintenance of the child. His wife does not give him any money from her income.

II. Basis in EU law:

4 1) Union Citizens Directive:

‘Article 7. Right of residence for more than three months

(1) All Union citizens shall have the right of residence on the territory of another Member State for a period of longer than three months if they:

- a) are workers or self-employed persons in the host Member State; or*
- b) have sufficient resources for themselves and their family members not to become a burden on the social assistance system of the host Member State during their period of residence and have comprehensive sickness insurance cover in the host Member State; or*
- c) ..., or*
- d) are family members accompanying or joining a Union citizen who satisfies the conditions referred to in points (a), (b) or (c).*

(2) ...

Article 24 Equal treatment

(1) Subject to such specific provisions as are expressly provided for in the Treaty and secondary law, all Union citizens residing on the basis of this Directive in the territory of the host Member State shall enjoy equal treatment with the nationals of that Member State within the scope of the Treaty. The benefit of this right shall be extended to family members who are not nationals of a Member State and who have the right of residence or permanent residence. ...’

III. National legislation:

5 1) Allgemeines Sozialversicherungsgesetz

(Austrian Law on General Social Insurance, ‘the ASVG’, BGBl 1955/189):

‘Conditions governing the entitlement to the compensatory supplement

Paragraph 292. (1) If a pension plus any other net income accruing to a pensioner, together with amounts to be taken into account pursuant to Paragraph 294, fall short of the appropriate standard rate for that pensioner (Paragraph 293), the pensioner shall be entitled to a compensatory supplement to

that pension in accordance with the provisions of this subparagraph, provided that he or she is legally and habitually resident in Austria.

(2) When determining the entitlement under subparagraph 1, the total net income of the spouse or civil partner living in the joint household shall also be taken into account, having due regard to Paragraph 294(4). ...'

IV. Arguments of the parties and forms of order sought:

- 6 On 6 December 2017, Mr DS applied to the respondent Pensionsversicherungsanstalt (Pension Insurance Institution, 'the PVA'), seeking the grant of a compensatory supplement to his pension. By decision of 28 April 2020, the PVA rejected that application on the ground that Mr DS lacked sufficient resources to ensure that he would not have to claim social security benefits or the compensatory supplement for the duration of his intended stay in Austria. Hence, he was not legally resident in Austria.
- 7 By his action contesting that decision, Mr DS sought an order for a compensatory supplement to be awarded in the amount prescribed by law. According to his submissions, his residence was lawful in view of the fact that his marriage was still effect and his wife was gainfully employed. The PVA contended in reply that the appellant, who was economically inactive, was not suffering from financial difficulties that were, by any means, merely temporary in nature, and asserted that it had already been foreseeable at the time he took up residence in Austria that he would have to be a burden on the social assistance system. The compensatory supplement that had been applied for would exceed his Romanian pension by more than 30 times, without him ever having made any personal financial contribution to the Austrian social assistance system.

V. Procedure to date:

- 8 The court of first instance (Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna)) dismissed the application on the ground that the overall family income was insufficient to ensure subsistence and that, consequently, the appellant was not lawfully resident in Austria. The court of second instance (Oberlandesgericht Wien (Higher Regional Court, Vienna) upheld that judgment. It took the legal view that the Union Citizens Directive did not guarantee that the spouse of a migrant worker could have unrestricted access to the social benefits of the host Member State in all cases. In view of the particular circumstances of the individual case, the appellant had to be denied a right of residence as a spouse, with an accompanying entitlement to a compensatory supplement, because this would result in a manifestly unreasonable burden (constituting an abuse of rights) being placed on the Austrian social assistance system. Mr DS lodged an appeal on a point of law (*Revision*) with the Oberster Gerichtshof (Supreme Court) contesting that decision. He requested that his application be granted. The PVA requests that the appeal on a point of law be rejected.

VI. Reasons for the question referred:

- 9 1. Paragraph 292(1) of the ASVG stipulates that the entitlement to the compensatory supplement is subject to the condition that the

pensioner 'is legally and habitually resident in Austria'. In its decision in Case C-160/02, *Skalka* (EU:C:2004:269), the Court of Justice of the European Union ('CJEU') classified the Austrian compensatory supplement as a 'special non-contributory benefit' within the meaning of Article 70 of Regulation (EC) [No] 883/2004 (and not as a social assistance benefit in the sense of 'social and medical care'). By virtue of Article 70(2)(c) of Regulation (EC) [No] 883/2004, the compensatory supplement was entered in the catalogue set out in Annex X of that Regulation, just like the German benefits to cover subsistence costs provided for under the Sozialgesetzbuch (German Social Security Code, ('SGB') Zweites Buch ('Book II') ('Hartz IV')). According to the case-law of the CJEU, however, the fact that a benefit such as the Austrian compensatory supplement has been classified as a 'special non-contributory benefit', within the meaning of Article 70 of Regulation (EC) [No] 883/2004, does not preclude that benefit from simultaneously falling under the concept of social benefits within the meaning of the Union Citizens Directive, with the result that Article 24 of that directive would be applicable (C-140/12, *Brey* (EU:C:2013:565); C-333/13, *Dano* (EU:C:2014:2358); C-67/14, *Alimanovic* (EU:C:2015:597); C-299/14, *Garcia-Nieto and others* (EU:C:2016:114)).

- 10 2. According to the CJEU's settled case-law, citizenship of the European Union is intended to be the fundamental status of nationals of the Member States. Every citizen of the European Union can therefore invoke the prohibition against discrimination on grounds of nationality (Article 18 TFEU) in all situations that fall within the material scope of application of EU law, which is also given concrete expression in Article 4 of Regulation (EC) [No] 883/2004 and in Article 24 of the Union Citizens Directive. Those situations include, for example, the exercise of the right granted under Article 21 TFEU to move and reside freely within the territory of the Member States, subject to the limitations and conditions also laid down, *inter alia*, in the Union Citizens Directive. That Directive provided for a graduated system with regard to the right of residence in the host Member State, which culminates in the right of permanent residence (see CJEU C-424/10, C-425/10, *Ziolkowski and Szeja* (EU:C:2011:866) paragraph 38; for the most recent case addressing all of these issues, see CJEU C-411/20, *Familienkasse Niedersachsen-Bremen*, (EU:C:2022:602) paragraph 28 et seq.).
- 11 3. Firstly, for periods of residence of up to three months, Article 6 of the Union Citizens Directive limits the conditions or formalities applicable to the right of residence to the requirement to hold a valid identity card or passport. Article 14(1) of that directive maintains that right of residence for European Union citizens and their family members as long as they do not become an unreasonable burden on the social assistance system of the host Member State (C-411/20, paragraph 31). Secondly, in cases of residence lasting more than three months, the exercise of the right of residence is subject to the conditions laid down in Article 7(1) of the Union Citizens Directive, and Article 14(2) of that directive further provides that

Union citizens and their family members have that right only for as long as they satisfy those conditions. It is clear from recital 10 of the Union Citizens Directive in particular that those conditions are intended to prevent, inter alia, such persons from becoming an unreasonable burden on the social assistance system of the host Member State (C-424/10, C-425/10, paragraph 39; C-181/19, *Jobcenter Krefeld* (EU:C:2020:794) paragraph 66; C-709/20, *The Department for Communities in Northern Ireland* (EU:C:2021:602) paragraph 76; differentiating Opinion of Advocate General Capeta, C-488/21, *Chief Appeals Officer and Others* (EU:C:2023:115) paragraph 118 et seq.). Thirdly, any European Union citizen who has resided legally (C-147/11, C-148/11, *Czop and Punakova* (EU:C:2012:538)) for a continuous period of five years in the host Member State acquires a right of permanent residence that is no longer subject to any conditions (see recital 18 of the Union Citizens Directive).

- 12 4.1 It is against the backdrop of that case-law, which – as far as can be ascertained – related to cases involving the application of Article 7(1)(b), read in conjunction with Article 2(2)(c) and (d) of the Union Citizens Directive, that the question arises for the Oberster Gerichtshof (Supreme Court) as to the interpretation of Article 7(1), read in conjunction with Article 2(2)(a) of the Union Citizens Directive, and this question must be referred to the CJEU for a preliminary ruling. It is true that the as-yet undecided Case C-488/21, *Chief Appeals Officer and Others*, also concerns a right of residence derived from a worker (Article 7(1)(a) of the Union Citizens Directive); however, that right is asserted by a direct relative in the ascending line (Article 2(2)(d) of the Union Citizens Directive). In that case, the ‘family member’ status depends also, according to the [German] wording of Article 2(2)(d) of the Union Citizens Directive, on whether the relative is provided with maintenance (*Unterhalt*) (or that she is ‘dependent’ on the migrant worker; see, in that regard, the Opinion of Advocate General Capeta, who refers to the various linguistic versions of that provision, C-488/21, paragraph 53).
- 13 4.2 The appellant rightly asserts that, according to the wording of Article 2(2)(a) and Article 7(1)(a) of the Union Citizens Directive, he is to be regarded, without any additional preconditions – particularly without any requirement for ‘dependency’ in terms of the actual provision of maintenance (*Unterhalt*), as a ‘spouse’ family member of his wife, who is employed as a migrant worker in Austria (Opinion of Advocate General Mazák, C-310/08, *Ibrahim and Secretary of State for the Home Department* (EU:C:2009:641, paragraph 41)). Moreover, if the appellant were to be refused the compensatory supplement, then his wife – as a migrant worker – would in any event be placed in a less advantageous position than that enjoyed by an Austrian worker whose spouse is entitled to claim a compensatory supplement; that could constitute an infringement of Article 7 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 (see the Opinion of Advocate General Capeta, C-488/21, paragraph 92).
- 14 4.3 Militating against that position, however, is the fact that in the above-mentioned case-law, the CJEU, citing recital 10 in the preamble to the Union

Citizens Directive, affirmed the criterion that persons must not become an unreasonable burden on the social assistance system of the host Member State, even for periods of residence lasting longer than three months; in doing so, the CJEU referred only in general terms to the conditions set out in ‘Article 7(1) of the Union Citizens Directive’ (C-333/13, *Dano*, paragraph 71). The primary objective of the Union Citizens Directive is to promote the free movement of EU citizens; the objective of protecting an EU citizen’s family life and the integration of his or her family in the host Member State is pursued (only) as an objective that is secondary to the primary objective (C-930/19, *Belgian State* (EU:C:2021:657, paragraph 82)). In fact, according to the primary objective of the Union Citizens Directive, the appellant – as an economically inactive EU citizen – would also have to rely on an original right of residence under Article 7(1)(b) of the Union Citizens Directive. However, in view of the appellant’s undisputed lack of sufficient resources, it would not be possible for such a right of residence under EU law to be upheld in the present case. Against this background, the question therefore arises as to whether, in such a situation, the appellant can rely on a right of residence as a family member that is merely derived from his wife, notwithstanding the fact that there is – according to the findings – a lack of sufficient resources, even after taking into account the total family income. If that were to be affirmed, the respondent would be justified in asserting in its objection that an EU citizen in the appellant’s situation, whose period of residence was of between three months and five years, would thus be placed in the same position as if he or she had already acquired the right of permanent residence. In the view of the Oberster Gerichtshof (Supreme Court), however, this would be at odds with the above-mentioned case-law of the CJEU, according to which every migrant citizen of the European Union must avoid becoming an unreasonable burden on the social assistance systems of the host Member State (see recitals 10 and 16 of Directive 2004/38/EC).

VII. Stay of proceedings:

15 ...

Oberster Gerichtshof (Supreme Court)
Vienna, 16 May 2023

...