Anonymised version

Case C-297/24 [Broslon] [i]

Request for a preliminary ruling

Date lodged:

26 April 2024

Referring court:

Cour de cassation (Luxembourg)

Date of the decision to refer:

25 April 2024

Appellant:

CY

Respondent:

Caisse pour l'avenir des enfants

[…]

between

CY, living in [France],

appellant on a point of law,

[…]

and

the CAISSE POUR L'AVENIR DES ENFANTS […]

respondent on a point of law,

[i] The name of the present case is a fictitious name. It does not correspond to the name of any party to the proceedings.

[…] Having regard to the judgment under appeal delivered on 2 March 2023 […] by the Conseil supérieur de la sécurité sociale (Higher Social Security Board, Luxembourg);

[…]

Facts

According to the judgment under appeal, […] the [Caisse pour l'avenir des enfants (Children's Future Fund, Luxembourg)] withdrew from CY, a frontier worker, […] his entitlement to the family allowance received for his spouse's child, who was born from a previous marriage, on the ground that the child was no longer to be regarded as a member of his family pursuant to Articles 269 and 270 of the Code de la sécurité sociale luxembourgeois (Luxembourg Social Security Code), as worded in accordance with the Law of 23 July 2016 amending, in particular, the Social Security Code.

The Conseil arbitral de la sécurité sociale (Social Security Arbitration Board, Luxembourg) upheld the appellant's appeal on a point of law seeking restoration of the payment of the family allowance to him.

The Higher Social Security Board stated, by alteration, that the [Caisse pour l'avenir des enfants] had rightly withdrawn from CY his entitlement to the family allowance.

Grounds of the appeal on a point of law

Statement of grounds

First ground of appeal, *'alleging infringement or incorrect application or misinterpretation of Article 1(i) and Article 67 of Regulation (EC) No 8832004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, read in conjunction with Article 7(2) of Regulation No 492/2011 and with Article 2(2) 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.*

In that the judgment under appeal did not give a broad interpretation of the concept of support for the non-biological child of the frontier worker as envisaged by the Court of Justice in its judgment of 2 April 2020, Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker) *(C-802/18, EU:C:2020:269),*

Whereas it should have applied that broad interpretation and granted the frontier worker entitlement to the family allowances relating to the child of his spouse Clara.',

Second ground of appeal, [based on national law] […]

Third ground of appeal *'alleging infringement of a rule of law and, specifically, non-application or incorrect application or misapplication of Article 2(2)(c) of Directive 2004/38/EC;*

In that the Higher Social Security Board held that the appellant did not support his stepchildren by failing to apply the presumption of a dependent child laid down in Article 2(2)(c) of Directive 2004/38/EC;

Whereas that presumption applies to all children under the age of 21;',

Fourth ground of appeal *'alleging infringement of a rule of law and, specifically, non-application or incorrect application or misapplication of Articles 269 and 270 of the Social Security Code as amended by the Law of 23 July 2016 and as interpreted in the light of the judgment of the Court of Justice of 2 April 2020,* Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker) *(C-802/18, EU:C:2020:269),*

In that the Higher Social Security Board held that the appellant did not support his stepchildren and did not prove that he contributed to the whole of household expenditure;

Whereas the appellant submitted a multitude of documents justifying his contribution to the maintenance of the child, which the appeal court itself established while rejecting CY's application',

Fifth ground of appeal [based on national law] […] **Sixth ground of appeal** [based on national law] […] **Seventh ground of appeal** [based on national law] […] *and*

Eighth ground of appeal [based on national law] […].

Response of the Court [of Cassation]

The interpretation of European Union law, which is a prerequisite

The Court of Justice of the European Union ('the Court of Justice') has ruled that '*Article 45 TFEU and Article 7(2) 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 must be interpreted as meaning that a family allowance based on the fact that a frontier worker pursues an activity as an employed person in a Member State constitutes a social advantage within the meaning of those provisions*.

Article 1(i) and Article 67 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, both read in conjunction with Article 7(2) of Regulation

No 492/2011 and with Article 2(2) 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, must be interpreted as precluding provisions of a Member State according to which frontier workers are entitled to receive a family allowance, on the basis of the fact that they pursue an activity as employed persons in that Member State, solely for their own children, and not for a spouse's children with whom those workers have no child-parent relationship, but whom those workers support, whereas any child residing in that Member State is entitled to receive that allowance' (judgment of 2 April 2020, *Caisse pour l'avenir des enfants* (*Child of the spouse of a frontier worker*), C-802/18, EU:C:2020:269).

The Court of Justice therefore made a frontier worker's entitlement to payment of the family allowance for his or her spouse's child with whom the worker has no child-parent relationship subject to evidence that he or she fulfils the condition of supporting that child.

Although the answer in law provided by the Court of Justice concerns the child only of the frontier worker's spouse, it follows from the grounds of the judgment that the same solution applies to the child of the registered partner of a frontier worker with whom that child has no child-parent relationship (judgment of 2 April 2020, *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)*, C-802/18, EU:C:2020:269, paragraphs 51 and 52).

Applying that criterion, the appeal judges, in order to justify the decision to withdraw the family allowance,

– stated implicitly, but necessarily, that evidence of the existence of a marriage between the frontier worker and the child's mother and of the existence of a joint household shared by the frontier worker, his spouse and the child, that evidence, taken in isolation or together, did not establish that the condition was fulfilled,

– held that the two biological parents had the means to contribute to the child's maintenance and contributed to it, when the mother was pursuing a professional activity and the father was paying a maintenance contribution of EUR 150, in order to conclude that 'the biological parents assume the whole cost of their child's maintenance',

– stated that the evidence of expenditure described as day-to-day household costs (water bills, energy and heating costs, monthly mortgage payments), amounts paid for the child (the child's monthly telephone subscription, purchase of a mobile, the child's psychological care) and other evidence (exchanges of messages, tense relationship with the biological father, good understanding

between the frontier worker and the child) did not prove that CY supported the child when it was not proved that those amounts were incurred solely by the frontier worker and when the amounts were only occasional, amounting to supplements, 'particularly in the light of the objective factors highlighted above, according to which the biological parents cover the child's maintenance costs'.

The concept of '*support*' was used at the outset by the Court of Justice in order to state that a frontier worker is entitled to payment of a State benefit as a social advantage, in the case in question, financial aid for higher education studies, for his or her own child, where he or she continues to support that child (judgments of 26 February 1992, *Bemini*, C-3/90, ECLI:EU:C:1992:89, paragraphs 25 and 29; of 8 June 1999, *Meeusen*, C-337/97, ECLI:EU:C:1999:284, paragraph 19; of 14 June 2012, *Commission* v *Netherlands*, C-342, ECLI:EU:C:2012:346, paragraph 35, and of 20 June 2013, *Guirsch*, C-20/12, ECLI:EU:C:2013:411, paragraph 39), without the concept being defined in the course of those judgments.

Subsequently, still in the context of a social advantage constituted by financial aid for higher education studies, but concerning a child who has no child-parent relationship with the frontier worker, the Court of Justice clarified the concept of 'support' by stating, first of all, that it '*d[oes] not presuppose a right to maintenance*' *(judgment of 15 December 2016, Depesme and Others, C-401/15 to C-403/15, EU:C:2016:955, paragraph 58)*, adding that '*the status of dependent member of a family is the result of a factual situation. The person having that status is a member of the family who is supported by the worker and there is no need to determine the reasons for recourse to the worker's support or to raise the question whether the person concerned is able to support himself [or herself] by taking up paid employment'(paragraphs 58 and 59). It concluded that 'the status of dependent member of a family is the result of a factual situation, which it is for the Member State and, if appropriate, the national courts to assess. The status of a family member of a frontier worker who is dependent on that worker may, when it relates to the case of a child of a spouse or recognised partner of that worker, be evidenced by objective factors, such as a joint household shared by that worker and the student, and it is not necessary to determine the reasons for the frontier worker's contribution to the maintenance of the student or make a precise estimation of its amount'* (Ibidem, paragraph 60).

The Court of Justice then applied the criterion of '*support*' to the question whether a frontier worker is entitled to the social advantage constituted by the payment of a family allowance, for a child with whom the worker does not have a child-parent relationship, stating in the grounds of its decision that '*a child of a frontier worker, who is able to benefit indirectly from the social advantages referred to in the latter provision, means not only a child who has a child-parent relationship with that worker, but also a child of the spouse or registered partner of that worker, in the case where that worker provides for the upkeep of that child. According to the Court, that latter requirement is the result of a factual situation, which it is for the national authorities and, if appropriate, the national courts, to*

assess, on the basis of evidence provided by the applicant, and it is not necessary for them to determine the reasons for that contribution or to make a precise estimation of its amount' (judgment of 2 April 2020, op. cit., paragraph 50). The Court of Justice took care to state, in fact, 'that the biological father of the child does not pay any maintenance to the child's mother. It appears therefore that FV, the spouse of HY's mother, supports that child, a matter which it is nevertheless for the referring court to verify' (judgment of 2 April 2020, *Caisse pour l'avenir des enfants (Child of the spouse of a frontier worker)*, C-802/18, EU:C:2020:269 (paragraph 52)).

The Court of Justice has also found that 'the concept of a "member of the family" of a frontier worker able to benefit indirectly from equal treatment under Article 7(2) of Regulation No 492/2011 is the same as that of a "family member" for the purposes of Article 2(2) of Directive 2004/38, which includes the spouse or partner with whom the EU citizen has contracted a registered partnership, the direct descendants who are under the age of 21 or are dependants, and the direct descendants of the spouse or partner. The Court has had particular regard, in this respect, to recital 1, Article 1 and Article 2(2) of Directive 2014/54' (paragraph 51).

The Court of Cassation infers first of all from those developments that the clarification that the term 'support' is the result of a factual situation does not mean that it is a purely factual concept excluded from review by the Court of Justice and the Court of Cassation, but that that wording was intended to emphasise that that concept is assessed independently of any right of the child to maintenance (as expressly stated in the judgment of 15 December 2016, *Depesme and Others*, C-401/15 to C-403/15, EU:C:2016:955, paragraph 58).

The Court of Cassation then infers from the above that the concept of 'support', in the context of legislation relating to entitlement to social advantages, constitutes an autonomous concept of EU law which requires a uniform interpretation and application.

However, such a uniform interpretation is not currently ensured in the light of the questions raised by the points of law under discussion.

In that regard, the Court of Cassation is prompted to inquire about the scope of the example used in the judgment of 15 December 2016, *Depesme and Others*, (C-401/15 to C-403/15, EU:C:2016:955, paragraph 60) to illustrate '*objective factors, such as a joint household shared by that worker and the student*', first, as to whether that point is mentioned merely as an example or, on the contrary, as a condition, in which case the question arises whether it is a sufficient condition or a necessary condition, and, second, as to whether the mode of financing of the joint household matters, since it is necessary to investigate whether the frontier worker contributes in part or in full to that financing.

As to the needs of the child to be taken into consideration which the frontier worker meets, the Court is called upon to consider whether only the maintenance needs essential to the child's subsistence should be taken into account (food, clothing, accommodation, education …), or whether, in general, all expenditure of whatever kind, including on pleasurable activities or mere convenience (mobile telephone, restaurants, driving licence …) or even on sumptuous, lavish or luxury items (regular purchases of electronic equipment, holidays in remote countries …) intended to ensure a certain standard of living should be considered.

As to the manner in which the frontier worker supports the child, the Court of Cassation wonders whether the frontier worker's contribution to the child's maintenance must take the form of cash payments made directly to the child, or whether it can take the form of expenditure made in the interest of the child. In the same context, the question arises whether the expenditure must be made, as the findings of the Parquet general (Principal Public Prosecutor's Office) seem to suggest, in the specific, or even exclusive, interest of the child, or whether expenditure incurred in the common interest of the family unit (monthly mortgage payments, rent, purchase of equipment used in common …) may be taken into account. Again, on the subject of specific support arrangements, the question arises whether the expenditure made by the frontier worker in order to support the child must have a certain degree of […] regularity or frequency (mortgage loan, rent, electricity and heating costs, telephone bills …) or whether the assumption of non-recurring costs (occasional purchases of clothing …) is also to be considered. Finally, whilst noting that the Court of Justice states that, in assessing the factual situation, it is not necessary to determine the reasons for the frontier worker's contribution or make a precise estimation of its amount (judgments of 15 December 2016, *Depesme and Others*, C-401/15 to C-403/15 EU:C:2016:955, paragraph 64, and of 2 April 2020, *Caisse pour l'avenir des enfants*, C-802/18 EU:C:2020:269, paragraph 50), the Court of Cassation wonders whether any contribution, however small, is to be taken into account, or whether it must be of a fairly significant level, and in the latter case whether that criterion must be assessed in relation to the child's needs or in relation to the frontier worker's financial situation.

The origin of the funds may also come into question, in that, in certain cases, the frontier worker maintains with his or her spouse or registered partner, who is a parent of the child, a joint bank account used to pay expenditure advanced in court proceedings in order to demonstrate that the condition of '*supporting*' the child has been fulfilled, without maintaining that account exclusively and without establishing to what extent her or she maintains that account, in which case the question arises whether the contribution to the child's needs comes from the frontier worker.

The Court of Cassation also wonders about the scope of the statement made by the Court of Justice in the judgment of 15 December 2016, *Depesme and Others*, C-401/15 to C-403/15 EU:C:2016:955, paragraph 62) that '*the EU legislature takes the view that the children are, in any case, presumed to be dependent until*

the age of 21 years', since it needs to ascertain whether any child under the age of 21, on account of that age condition taken alone or combined with other factors, must be regarded as having his or her needs supported by the frontier worker.

The parents' contribution to the child's needs must then be addressed. They are bound by law by a maintenance obligation, unlike the frontier worker who is not bound by such an obligation. The criterion of '*supporting*' the child, however, subjects the frontier worker to a factual assessment. Therefore, the question arises whether it is sufficient to establish the existence or extent of the parents' maintenance obligation in order to exclude the existence of the frontier worker's contribution, or whether it is also necessary to ensure that the parents' maintenance obligation was fixed at an appropriate amount, and whether they actually fulfil their maintenance obligation, so as to make a supplementary or additional contribution by the frontier worker unnecessary. In the absence of effective payment of such support, the question arises whether it is necessary to verify whether the spouse or registered partner of the frontier worker has at least tried to take enforcement measures and whether, ultimately the frontier worker's contribution remedies the failure to pay of one of the parents. In relation to that maintenance support and to the question whether it is fixed at an appropriate amount, the method of fixing the amount by judicial or conventional means may have an effect. Those aspects may be linked to the question, raised above, of what expenditure on the child is to be considered. If only maintenance expenditure essential to the child's subsistence is taken into account, the parents' maintenance obligation will, in principle, cover those needs, rendering nugatory a supplementary or additional contribution by the frontier worker to cover such needs.

As regards relations with the child's other parent, the question also arises whether it is relevant to examine the arrangements whereby the child lives alternately with his two parents, since visiting and extended accommodation rights or a shared residence may cause the other parent, in principle, to assume more substantially in kind his or her maintenance obligation, leaving less room for any necessity for the frontier worker to cover the child's needs.

All those questions must be seen against the background of the principle that the provisions establishing the free movement of workers must be construed broadly (judgment of 15 September 2016, *Depesme and Others*, C-401/15 to C-403/15 EU:C:2016:955, paragraph 58), and therefore of any limits on that principle.

Those considerations lead the Court, before any other step is taken in the case, to refer to the Court of Justice the questions for a preliminary ruling on the scope of European Union law as set out in the operative part of the present judgment.

ON THOSE GROUNDS,

the Court of Cassation

[…] [asks] the Court of Justice of the European Union [the] following questions:

1(a) Is the condition of '*supporting*' a child, from which is derived the status of family member within the meaning of the provisions of EU law, as applied by the case-law of the Court of Justice in the context of the free movement of workers and of the receipt by a frontier worker of a social advantage linked to the pursuit, by that worker, of an activity as an employed person in a Member State, for the child of his or her spouse or registered partner, with whom the worker has no child-parent relationship, read alone or in conjunction with the principle that the provisions intended to ensure the free movement of workers must be construed broadly, to be interpreted as being fulfilled, and therefore as conferring entitlement to the receipt of the social advantage,

– merely by reason of the marriage or registered partnership between the frontier and one of the child's parents

– merely by reason of a joint home or household shared by the frontier worker and the child

– merely by reason of the frontier worker's assumption, in general, of expenditure of whatever kind for the benefit of the child, even when

  – it covers needs other than essential or maintenance needs

  – it is made to a third party and benefits the child only indirectly

  – it is not made in the exclusive or specific interest of the child, but benefits the whole household

  – it is only occasional

  – it is less than that of the parents

  – it is merely insignificant in the light of the child's needs

– merely by reason of the fact that the expenditure is made from a joint account held by the frontier worker and his or her spouse or registered partner, who is a parent of the child, without regard to the origin of the funds present in the account

– merely by reason of the fact that the child is under 21 years of age?

1(b) If the answer to Question 1 is in the negative, is the condition of '*support*' to be interpreted as being fulfilled, and therefore as conferring entitlement to the receipt of the social advantage, where two or more of those circumstances are present?

2 Is the condition of '*supporting*' a child, from which is derived the status of family member within the meaning of the provisions of EU law, as applied by the

case-law of the Court of Justice in the context of the free movement of workers and of the receipt by a frontier worker of a social advantage linked to the pursuit, by that worker, of an activity as an employed person in a Member State, for the child of his or her spouse or registered partner, with whom the worker has no child-parent relationship, read alone or in conjunction with the principle that the provisions intended to ensure the free movement of workers must be construed broadly, to be interpreted as not being fulfilled, and therefore as excluding the right to receive the social advantage,

– merely by reason of the existence of à maintenance obligation imposed on the child's parents, irrespective

    – of whether the amount of the maintenance claim is fixed by judicial or conventional means

    – of the amount at which that maintenance claim was fixed

    – of whether the debtor actually pays that maintenance debt

    – of whether the frontier worker's contribution remedies the failure to pay of one of the child's parents

– merely by reason of the fact that the child lives periodically, in the context of exercising visiting and accommodation rights or alternate residence or another arrangement, with the other parent?

stays the proceedings pending the decision of the Court of Justice of the European Union;

[…]