Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

25 November 2020*

(Request for a preliminary ruling – Directive 2003/109/EC – Status of third-country nationals who are long-term residents – Article 11 – Right to equal treatment – Social security – Legislation of a Member State excluding, for the determination of rights to a family benefit, the family members of a long-term resident who do not reside in the territory of that Member State)

In Case C-303/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Corte suprema di cassazione (Supreme Court of Cassation, Italy), made by decision of 5 February 2019, received at the Court on 11 April 2019, in the proceedings

Istituto nazionale della previdenza sociale (INPS),

v

VR,

THE COURT (Fifth Chamber),

composed of E. Regan, President of the Chamber, M. Ilešič, E. Juhász, C. Lycourgos and I. Jarukaitis (Rapporteur), Judges,

Advocate General: E. Tanchev,

Registrar: M. Krausenböck, Administrator,

having regard to the written procedure and further to the hearing on 27 February 2020,

after considering the observations submitted on behalf of:

– the Istituto Nazionale della Previdenza Sociale (INPS), by A. Coretti, V. Stumpo and M. Sferrazza, avvocati,

– VR, by A. Guariso and L. Neri, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by A. Giordano and P. Gentili, avvocati dello Stato,

– the European Commission, by C. Cattabriga, A. Azéma and B.-R. Killmann, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 11 June 2020,

* Language of the case: Italian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 11(1)(d) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44).

2 The request has been made in proceedings between the Istituto Nazionale della Previdenza Sociale (Italian National Social Security Institute) (INPS) and VR concerning the rejection of an application for a family benefit for a period during which the wife and children of the person concerned resided in their third country of origin.

Legal context

European Union law

3 Recitals 2, 4, 6 and 12 of Directive 2003/109 state:

'(2) The European Council, at its special meeting in Tampere on 15 and 16 October 1999, stated that the legal status of third-country nationals should be approximated to that of Member States' nationals and that a person who has resided legally in a Member State for a period of time to be determined and who holds a long-term residence permit should be granted in that Member State a set of uniform rights which are as near as possible to those enjoyed by citizens of the European Union.

…

(4) The integration of third-country nationals who are long-term residents in the Member States is a key element in promoting economic and social cohesion, a fundamental objective of the [European Union] stated in the Treaty.

…

(6) The main criterion for acquiring the status of long-term resident should be the duration of residence in the territory of a Member State. Residence should be both legal and continuous in order to show that the person has put down roots in the country. Provision should be made for a degree of flexibility so that account can be taken of circumstances in which a person might have to leave the territory on a temporary basis.

…

(12) In order to constitute a genuine instrument for the integration of long-term residents into society in which they live, long-term residents should enjoy equality of treatment with citizens of the Member State in a wide range of economic and social matters, under the relevant conditions defined by this Directive.'

4 Article 2 of that directive, headed 'Definitions', states as follows:

'For the purposes of this Directive:

(a) "third-country national" means any person who is not a citizen of the Union within the meaning of Article 17(1) [EC];

(b) "long-term resident" means any third-country national who has long-term resident status as provided for under Articles 4 to 7;

…

(e) "family members" means the third-country nationals who reside in the Member State concerned in accordance with Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification [(OJ 2003 L 251, p. 12)];

…'

5 Article 11 of that directive, entitled 'Equal treatment', provides that:

'1. Long-term residents shall enjoy equal treatment with nationals as regards:

…

(d) social security, social assistance and social protection as defined by national law;

…

2. With respect to the provisions of paragraph 1, points (b), (d), (e), (f) and (g), the Member State concerned may restrict equal treatment to cases where the registered or usual place of residence of the long-term resident, or that of family members for whom he/she claims benefits, lies within the territory of the Member State concerned.

…

4. Member States may limit equal treatment in respect of social assistance and social protection to core benefits.

…'

Italian law

6 It is apparent from the order for reference that decreto legge n. 69 – Norme in materia previdenziale, per il miglioramento delle Gestioni degli enti portuali ed altre disposizioni urgenti (Decree-Law No 69, laying down social security provisions, for the purpose of improving the management of port bodies and other emergency measures) of 13 March 1988 (GURI No 61 of 14 March 1988), converted into Law No 153 of 13 May 1988 (GURI No 112 of 14 May 1988) ('Law No 153/1988'), introduced the family unit allowance, the amount of which depends on the number of children under the age of 18 in the family unit and its income ("the family unit allowance").

7 Article 2(6) of Law No 153/1988 states:

'The family unit shall be made up of the spouses, excluding those legally and effectively separated, and children and equivalents aged less than 18 years or regardless of age where, because of disability or mental or physical impairment, they are completely and permanently unable to perform paid work. Brothers, sisters, nieces and nephews and grandchildren under the age of 18, or regardless of age, where they are present and, because of disabilities or physical or mental impairments, are completely and permanently unable to perform paid work, may also be part of the household, under the same conditions as children and equivalents if they are orphans of father and mother and are not entitled to a survivor's pension.'

8 According to Article 2(6-bis) of Law No 153/1988 a family unit, within the meaning of that law, does not include the spouses and children and equivalents of foreign nationals who are not resident in the territory of the Italian Republic, except where the State of which that foreign national is a citizen is subject to reciprocity with Italian citizens, or where an international convention on family allowances has been concluded.

9 Directive 2003/109 has been transposed into national law by the decreto legislativo n. 3 – Attuazione della direttiva 2003/109/CE relativa allo status di cittadini di Paesi terzi soggiornanti di lungo periodo (Legislative Decree No 3, transposing Directive [2003/109]), of 8 January 2007 (GURI No. 24, of 30 January 2007) ('Legislative Decree No. 3/2007'), which incorporated the provisions of that directive into Legislative Decree No. 286 – Testo unico delle disposizioni concernenti la disciplina dell'immigrazione e norme sulla condizione dello straniero (Legislative Decree No. 286, single text of the provisions concerning the regulation of immigration and norms on the status of foreigners), of 25 July 1998 (ordinary supplement to GURI No. 191, of 18 August 1998) ('Legislative Decree No. 286/1998'). Article 9(12)(c) of that legislative decree provides that a third-country national who holds a long-term residence permit is to receive, inter alia, social security and social assistance benefits 'unless otherwise provided and on condition that it is shown that the foreign national actually resides in national territory'.

The dispute in the main proceedings and the question referred for a preliminary ruling

10 VR is a third-country national who has been working in Italy and has held a long-term residence permit since 2010, in accordance with Legislative Decree No 286/1998. From September 2011 until April 2014 his wife and five children resided in their country of origin, Pakistan.

11 The INPS having refused, on the basis of Article 2(6-bis) of Law No 153/1988, to pay him the family unit allowance during that period, VR brought an action before the Tribunale del lavoro di Brescia (Labour Court, Brescia, Italy) against the INPS and his employer, claiming that that refusal was discriminatory. That court upheld his claims and ordered the defendants to pay him the corresponding sums, after disapplying that provision, which it deemed to be contrary to Article 11 of Directive 2003/109.

12 The appeal lodged by the INPS against that decision before the Corte d'appello di Brescia (Court of Appeal, Brescia, Italy) was dismissed on the ground that the family unit allowance was a core social assistance benefit which could not fall within the derogations from the principle of equal treatment permitted by Directive 2003/109.

13 The INPS then appealed to the referring court, the Corte suprema di cassazione (Supreme Court of Cassation, Italy), arguing that the family unit allowance is not a social assistance payment, but a social security benefit and, in any event, that it cannot be regarded as a core benefit to which the derogation from the obligation of equal treatment does not apply.

14 The referring court states that the outcome of the dispute in the main proceedings depends on the interpretation of Article 11(1)(d) of Directive 2003/109, and whether that provision requires the family members of the long-term resident, entitled to payment of the family unit allowance under Article 2 of Law No 153/1988, to be included in the category of family members eligible for that benefit, even though they do not reside in Italian territory.

15 It states, in that regard, that the family unit referred to in Article 2 of Law No 153/1988 serves not only as the basis for calculating the family unit allowance, but is also the beneficiary of that allowance, through the intermediary of the person receiving the remuneration or pension to which that allowance is tied. The latter is a financial supplement to which all workers in Italy are entitled, provided they are members of a family unit whose income does not exceed a certain threshold. For the period from 1 July 2018 to 30 June 2019, its amount, at the full rate, was EUR 137.50 per month for annual income not exceeding EUR 14 541.59. It is paid by the employer at the same time as the salary.

16 The referring court also states that, in its case-law, the Corte suprema di cassazione (Supreme Court of Cassation) has already had occasion to highlight the dual nature of the family unit allowance. On one hand, as it is linked to the income of all types of family unit and intended to guarantee a sufficient income to low-income families, it is a social security benefit. In accordance with the general rules of the social security scheme which includes that allowance, the protection of the families of workers is implemented by the payment of a supplement to remuneration for work performed. Financed by contributions paid by all employers, together with a supplement paid by the State, the family unit allowance is paid by the employer who makes the advance payment and is authorised to offset that amount against the social security contributions due. On the other hand, that allowance is a social assistance measure, as the income taken into account is increased, where necessary, to protect persons suffering from physical or mental infirmity or disability or minors with persistent difficulties in performing their duties and functions appropriate to their age. In any event, according to the referring court, it is a measure which falls within the scope of Article 11(1)(d) of Directive 2003/109.

17 The referring court points out that the members of the family unit are of fundamental importance to the family allowance scheme, who are regarded as the beneficiaries of the allowance. However, in light of the fact that the law designates the members of the family unit as the beneficiaries of a financial supplement, to which the person receiving the remuneration is entitled, and to which the allowance is linked, it asks whether Article 11(1)(d) of Directive 2003/109 precludes a provision such as Article 2(6-bis) of Law No 153/1988. In particular, it has doubts as to the interpretation of that directive, in the light of recital 4 and Article 2(e) thereof.

18 In those circumstances, the Corte suprema di cassazione (Supreme Court of Cassation) decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

‘Must Article 11(1)(d) of Council Directive 2003/109 … and the principle of equal treatment between long-term residents and nationals be interpreted as precluding national legislation under which, unlike the provisions laid down for nationals of the Member State, the family members of a worker who is a long-term resident and a third-country national are excluded when determining the members of the family unit, for the purpose of calculating the family unit allowance, where those individuals live in the third country of origin?’

Consideration of the question referred

19 By its question, the referring court asks, essentially, whether Article 11(1)(d) of Directive 2003/109 must be interpreted as precluding legislation of a Member State under which, for the purpose of determining entitlement to a social security benefit, the family members of long-term residents, within

the meaning of Article 2(b) thereof, who do not reside in the territory of that Member State but in a third country, are not be taken into account, whereas account is taken of family members of nationals of that Member State who reside in a third country.

20 It must be recalled that EU law does not detract from the Member States' power to organise their social security systems. In the absence of harmonisation at Union level, it is for each Member State to lay down the conditions under which social security benefits are granted, as well as the amount of such benefits and the period for which they are granted. However, when exercising that power, Member States must comply with European Union law (see, to that effect, judgment 5 October 2010, *Elchinov*, C-173/09, EU:C:2010:581, paragraph 40).

21 Article 11(1)(d) of that directive requires them to ensure that long-term residents enjoy equal treatment with nationals as regards, inter alia, the social security defined by national legislation.

22 However, under Article 11(2) of that directive, Member States may limit equal treatment, in particular, with regard to social security, to cases where the registered or habitual place of residence of the long-term resident, or that of the members of his/her family for whom the benefits are claimed, is in their territory.

23 Thus, Directive 2003/109 provides for a right to equal treatment, which is the general rule, and lists the derogations from that right which the Member States may establish, which is to be interpreted strictly. Therefore, those derogations can be relied on only if the authorities in the Member State concerned responsible for the implementation of that directive have stated clearly that they intended to rely on them (see, to that effect, judgment of 24 April 2012, *Kamberaj*, C-571/10, EU:C:2012:233, paragraphs 86 and 87, and of 21 June 2017, *Martinez Silva*, C-449/16, EU:C:2017:485, paragraph 29).

24 Since the national court has doubts as to the interpretation of Article 11(1)(d) of Directive 2003/109 in the light of recital 4 and Article 2(e) thereof, it should be observed, first of all, as the Advocate General observed in points 54 and 55 of his Opinion, that the latter provision, which defines 'family member' as any third-country national residing in the Member State concerned, in accordance with Council Directive 2003/86, is not intended to limit the right to equal treatment of long-term residents provided for in Article 11 of Directive 2003/109, but only to define this concept for the understanding of the provisions employing it.

25 Furthermore, if that definition meant that long-term residents whose family members do not reside in the territory of the Member State concerned were to be excluded from the right to equal treatment, Article 11(2) of Directive 2003/109, which affords Member States the possibility of derogating from it where, inter alia, the registered or habitual residence of the family members on behalf of whom the long-term resident claims benefits is not in their territory, would serve no purpose.

26 Second, as regards recital 4 of Directive 2003/109, it must be recalled, first of all, that the preamble to an EU act has no binding legal force and cannot be relied on as a ground either for derogating from the actual provisions of the act in question or for interpreting those provisions in a manner that is clearly contrary to their wording (see, to that effect, judgments of 19 November 1998, *Nilsson and Others*, C-162/97, EU:C:1998:554, paragraph 54, and of 19 December 2019, *Puppinck and Others* v *Commission*, C-418/18 P, EU:C:2019:1113, paragraph 76).

27 Furthermore, although it is apparent from that recital that the integration of third-country nationals, who are long-term residents in the Member States, is an objective pursued by that directive, it cannot be inferred from that recital that long-term residents whose family members do not reside in the territory of the Member State concerned are to be excluded from the right to equal treatment laid down in Article 11(1)(d) thereof, as such an exclusion is not laid down in any provision of that directive.

28 Since the INPS and the Italian Government submit that the exclusion of long-term residents whose family members are not resident in the territory of the Member State concerned is consistent with the objective of integration pursued by Directive 2003/109 on the ground that integration implies presence in that territory, it must be observed that it is apparent from recitals 2, 4, 6 and 12 to that directive that its objective is the integration of third-country nationals who are settled lawfully and on a long-term basis in the Member States and, for that purpose, to bring the rights of those nationals closer to those enjoyed by EU citizens, inter alia, by establishing equal treatment with the latter in a wide range of economic and social fields. Thus, long-term resident status enables the person benefiting from it to enjoy equal treatment in the fields covered by Article 11 of Directive 2003/109, under the conditions laid down in that article (judgment of 14 March 2019, *Y. Z and Others (Fraud with regard to family reunification)*, C-557/17, EU:C:2019:203, paragraph 63).

29 It follows, contrary to the submissions of the INPS and the Italian Government, that the exclusion of long-term residents from the right to equal treatment, even where the members of his family are not, for a period which may be temporary, as the facts of the case in the main proceedings show, resident in the territory of the Member State concerned, cannot be regarded as consistent with those objectives.

30 Therefore, subject to the derogation permitted by Article 11(2) of Directive 2003/109, a Member State may not refuse or reduce the entitlement to a social security benefit to long-term residents on the ground that members of his or her family, or some of them, are not resident in its territory but in a third country, when it grants that benefit to its nationals irrespective of the place of residence of their family members.

31 As regards the case in the main proceedings, it should be noted, in the first place, that the referring court itself states that the family unit allowance is in particular in the nature of a social security benefit which falls within the scope of Article 11(1)(d) of Directive 2003/109.

32 Secondly, that court states that the family unit is the basis for calculating the amount of that benefit. The INPS and the Italian Government submit, in that regard, that not taking account of family members not residing in the territory of the Italian Republic affects only the amount of the allowance, which, as the INPS stated at the hearing, is zero if all members of the family are resident outside the national territory.

33 It should be noted that both the non-payment of the allowance and the reduction of the amount, depending on whether all or some of the family members are absent from that territory, are contrary to the right to equal treatment provided for in Article 11(1)(d) of Directive 2003/109, since they constitute a difference in treatment between long-term residents and Italian nationals.

34 Contrary to the INPS' further submissions, such a difference in treatment cannot be justified by the fact that long-term residents and nationals of the host Member State are in a different situation because of their respective links with that State, such a justification being contrary to Article 11(1)(d) of Directive 2003/109 which, in accordance with its objectives, set out in paragraph 28 of the present judgment, requires equal treatment between them in the field of social security.

35 Similarly, as is clear from settled case-law, potential difficulties in checking the situation of the beneficiaries in the light of the conditions for the grant of the family unit allowance where family members are not residing in the territory of the Member State concerned, relied on by the INPS and the Italian Government, cannot justify that difference in treatment (see, by analogy, judgment of 26 May 2016, *Kohll and Kohll-Schlesser*, C-300/15, EU:C:2016:361, paragraph 59 and the case-law cited).

36 In the third place, the referring court points out that, under national law, family members are the persons entitled to the family unit allowance. However, entitlement to that allowance cannot be refused on that ground to a long-term resident whose family members are not resident in the

territory of the Italian Republic. Although members of the family unit are entitled to that allowance, which is the very purpose of a family benefit, it is clear from the information provided by that court, set out in paragraphs 15 and 16 above, that the payment is made to a worker or pensioner, who is also a member of the family unit.

37 It follows that Article 11(1)(d) of Directive 2003/109 precludes a provision, such as Article 2(6-bis) of Law No 153/1988, pursuant to which the spouse and the children or equivalents of a third-country national who are not resident in the territory of the Italian Republic do not form part of the family unit, within the meaning of that law, unless the State from which the foreign national derives provides for reciprocal treatment to Italian nationals or has concluded an international convention on family benefits, as referred to in the present case, except where, in accordance with the case-law set out in paragraph 23 of the present judgment, the Italian Republic has clearly indicated that it intended to rely on the derogation permitted by Article 11(2) thereof.

38 As the Advocate General observed in points 65 and 66 of his Opinion, it is apparent from the file before the Court, as the Italian Republic confirmed at the hearing, that the latter did not express such an intention when transposing Directive 2003/109 into national law.

39 The provisions of Article 2(6-bis) of Law No 153/1988 were adopted well before the transposition of Directive 2003/109 by Legislative Decree No 3/2007, which incorporated the provisions of that directive into Legislative Decree No 286/1998, Article 9(12)(c) of which makes access by the holder of a long-term residence permit to social assistance and social security benefits subject to the condition that s/he actually resides in the national territory, without reference to the place of residence of his or her family members.

40 In the light of all the foregoing, the answer to the question referred is that Article 11(1)(d) of Directive 2003/109 must be interpreted as precluding legislation of a Member State under which, for the purposes of determining entitlement to a social security benefit, the family members of a long-term resident, within the meaning of Article 2(b) thereof, who do not reside in the territory of that Member State, but in a third country are not taken into account, whereas the family members of a national of that Member State who reside in a third country are taken into account, where that Member State has not expressed its intention of relying on the derogation to equal treatment permitted by Article 11(2) of that directive by transposing it into national law.

Costs

41 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fifth Chamber) hereby rules:

Article 11(1)(d) of Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents must be interpreted as precluding legislation of a Member State under which, for the purposes of determining entitlement to a social security benefit, the family members of a long-term resident, within the meaning of Article 2(b) thereof, who do not reside in the territory of that Member State, but in a third country are not taken into account, whereas the family members of a national of that Member State who reside in a third country are taken into account, where that Member State has not expressed its intention of relying on the derogation to equal treatment permitted by Article 11(2) of that directive by transposing it into national law.

[Signatures]