ECLI:EU:C:2020:338

Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

30 April 2020 (*)

(Reference for a preliminary ruling — Freedom of movement for persons — Article 21 TFEU — Principle of non-discrimination on grounds of nationality — Article 18 TFEU — Convention for the avoidance of double taxation — Public sector workers — Pensioner residing in a Member State other than that paying retirement pension and who does not have the nationality of the Member State of residence — Income tax — Alleged loss of tax advantages — Alleged impediment to freedom of movement and alleged discrimination)

In Joined Cases C-168/19 and C-169/19,

TWO REQUESTS for a preliminary ruling under Article 267 TFEU from the Corte dei conti — Sezione Giurisdizionale per la Regione Puglia (Court of Auditors — Jurisdictional Chamber for the Region of Puglia, Italy), made by decisions of 10 July 2018, received at the Court on 25 February 2019, in the proceedings

HB (C-168/19)

IC (C-169/19)

v

Istituto nazionale della previdenza sociale (INPS),

THE COURT (Eighth Chamber),

composed of L.S. Rossi, President of the Chamber, J. Malenovský (Rapporteur) and N. Wahl, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– the Italian Government, by G. Palmieri, acting as Agent, and by E. De Bonis, avvocato dello Stato,

– the Belgian Government, by P. Cottin and J.-C. Halleux, acting as Agents,

– the German Government, by R. Kanitz and J. Möller, acting as Agents,

– the Greek Government, by E.-M. Mamouna and K. Georgiadis, acting as Agents,

– the French Government, by E. de Moustier and A. Alidière and by D. Colas, acting as Agents,

– the Netherlands Government, by M. Bulterman and M. Noort, acting as Agents,

– the Polish Government, by B. Majczyna, acting as Agent,

– the Swedish Government, by A. Falk, C. Meyer-Seitz, H. Shev, J. Lundberg and H. Eklinder, acting as Agents,

– the European Commission, by N. Gossement and B.-R. Killmann, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 These requests for a preliminary ruling concern the interpretation of Articles 18 TFEU and 21 TFEU.

2 The requests have been made in two sets of proceedings brought by HB and IC respectively against the Istituto nazionale della previdenza sociale (INPS) (National Social Security Institute, Italy) concerning the latter's refusal to pay the amount of their respective retirement pensions without levying Italian taxes.

Legal context

3 Article 18 of the convenzione tra la Repubblica italiana e la Repubblica portoghese per evitare le doppie imposizioni e prevenire l'evasione fiscal in materia di imposte sul reddito (Convention between the Italian Republic and the Portuguese Republic for the avoidance of double taxation and the prevention of tax evasion with regard to income tax), signed in Rome on 14 May 1980, ratified by the Italian Republic by legge n. 562 (Law No 562) of 10 July 1982 (ordinary supplement to GURI No 224 of 16 August 1982) ('the Italian-Portuguese Convention'), stipulates:

'Subject to the provisions of Article 19(2), pensions and other similar remuneration paid to a resident of a Contracting State in consideration of past employment shall be taxable only in that State.'

4 Article 19(2) of the Italian-Portuguese Convention provides:

'(a) The pensions paid by a Contracting State, by one of the political or administrative subdivisions of that State or by one of its local authorities, whether directly or from funds set up by them, to a natural person in respect of services provided to that State or local authority, shall be taxable in that State only.

(b) However, such pensions shall be taxable only in the other Contracting State if the individual is a resident and a national of that State.'

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

5 HB and IC, of Italian nationality, are former employees of the Italian public sector. They are each in receipt of a retirement pension paid by the INPS. After transferring their residence to Portugal, they requested the INPS, in 2015, that they receive, pursuant to Article 18 and Article 19(2) of the Italian-Portuguese Convention, the gross amount of their monthly retirement pension, without deduction of tax at source by the Italian Republic. The INPS rejected those requests, taking the view that, pursuant to Article 19 of the Italian-Portuguese Convention, unlike Italian pensioners in the private sector, retired employees in the Italian public sector must be taxed in Italy, and only in that Contracting State. HB and IC each brought actions against those decisions before the referring court, the Corte dei conti — Sezione Giurisdizionale per la Regione Puglia (Court of Auditors — Judicial Chamber for the Region of Puglia, Italy).

6 The referring court considers that the Italian-Portuguese Convention clearly introduces inequality of treatment between Italian pensioners in the private sector and Italian pensioners in the public sector resident in Portugal, in so far as the former indirectly enjoy more advantageous tax treatment than the latter, which constitutes, according to that court, an obstacle to the freedom of movement guaranteed to every citizen of the European Union under Article 21 TFEU.

7 The referring court also points out that the difference in the tax treatment of the retirement pensions of Italian nationals who transfer their residence to Portugal, depending on whether they are former public sector employees or former private sector employees, amounts to discrimination on grounds of nationality, which is prohibited by Article 18 TFEU, since, in order to be taxed in

Portugal, former private sector employees are merely required to be resident there, whereas former public sector employees must have acquired Portuguese nationality.

8 In those circumstances, the Corte dei Conti — Sezione Giurisdizionale per la Regione Puglia (Court of Auditors — Judicial Chamber for the Region of Puglia) decided to stay the proceedings and to refer the following question, worded identically in both joined cases, to the Court for a preliminary ruling:

'Must Articles 18 TFEU and 21 TFEU be interpreted as precluding legislation of a Member State which provides for the taxation, in that Member State, of the income of a person resident in another Member State who receives all of his or her income from the first Member State but who does not hold the nationality of the second Member State, without the benefit of the tax advantages provided by that second Member State?'

Consideration of the question referred

9 By its question, the referring court asks whether Articles 18 TFEU and 21 TFEU are to be interpreted as precluding legislation of a Member State which provides that the income of a person resident in another Member State, who receives all of his or her income from the first Member State but who does not hold the nationality of the second Member State, is taxed only in the first Member State, that person being thereby excluded from the benefit of the tax advantages offered by the second Member State.

10 A preliminary point to make is that, according to the Court's settled case-law, in the procedure laid down in Article 267 TFEU, which provides for cooperation between national courts and the Court of Justice, it is for the latter to provide the national court with an answer which will be of use to it and enable it to decide the case before it. To that end, the Court should, where necessary, reformulate the questions referred to it (judgment of 3 March 2020, *Gómez del Moral Guasch*, C-125/18, EU:C:2020:138, paragraph 27).

11 In that regard, it should be noted, in the first place, that, although the referring court does not specify whether the applicants in the main proceedings transferred their residence to Portugal after having ceased all occupational activity or not, it considers that their situation is governed by Article 21 TFEU on the freedom of movement of citizens of the Union. On the basis of that provision of the TFEU, the referring court appears to indicate to the Court that the transfer of residence took place after the applicants in the main proceedings had ceased all occupational activity. It is therefore only in the light of that fact that the Court will examine the question referred.

12 In the second place, contrary to what the Belgian and Swedish Governments submit in their written observations, Article 18 TFEU, which enshrines the principle of non-discrimination on grounds of nationality, is applicable to a situation such as that at issue in the main proceedings.

13 It is settled case-law of the Court of Justice that any citizen of the Union may rely on the prohibition of discrimination on grounds of nationality laid down in Article 18 TFEU in a situation where he or she has exercised the fundamental freedom of movement and residence within the territory of the Member States conferred by Article 21 TFEU (see, to that effect, judgments of 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, paragraphs 27 and 44 and the case-law cited, and of 13 June 2019, *TopFit and Biffi*, C-22/18, EU:C:2019:497, paragraph 29).

14 In the third and last place, it should be noted that it is apparent from the documents before the Court that Article 18 and Article 19(2) of the Italian-Portuguese Convention, which are drafted in

the same terms as the corresponding provisions of the Model Tax Convention on Income and on Capital drawn up by the Organisation for Economic Cooperation and Development (OECD), in its 2014 version, are intended to allocate powers of taxation between the Italian Republic and the Portuguese Republic in respect of pensions and include, in that regard, different connecting factors according to whether the taxpayers were employed in the private or public sector. The latter category of taxpayers is, in principle, taxed in the State responsible for payment of the retirement pension, unless they have the nationality of the other Contracting State in which they reside.

15 It is apparent from those preliminary considerations that, by its question, the referring court asks, in essence, whether Articles 18 TFEU and 21 TFEU preclude a tax scheme resulting from a double taxation convention concluded between two Member States under which the powers of taxation of those States in relation to the taxation of retirement pensions are allocated according to whether the beneficiaries of those pensions were in employment in the private sector or in the public sector and, in the latter case, depending on whether or not they are nationals of the Member State of residence.

16 In this regard, it should be recalled that, hearing requests for a preliminary ruling on the question of whether the conventions on double taxation concluded between the EU Member States must be compatible with the principle of equal treatment and, in general, with the freedoms of movement guaranteed by primary EU law, the Court has already held that the Member States are free to determine the connecting factors for the allocation of fiscal sovereignty in bilateral conventions for the avoidance of double taxation (judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 37 and the case-law cited).

17 Furthermore, it must be stated that the objective of a bilateral convention for the avoidance of double taxation, such as the Italian-Portuguese Agreement, is to prevent the same income from being taxed in each of the two parties to that convention; it is not to ensure that the tax to which the taxpayer is subject in one State is no higher than that to which he or she would be subject in the other contracting State (see, by analogy, judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 44 and the case-law cited).

18 To that end, it is not unreasonable for Member States to use the criteria followed in international tax practice and, in particular, as the Italian Republic and the Portuguese Republic have done in the present case, as is apparent from paragraph 14 of the present judgment, the Model Tax Convention on Income and on Capital drawn up by the OECD, Article 19(2) of which, in the 2014 version, provides for connecting factors such as the paying State and nationality (see, to that effect, judgments of 12 May 1998, *Gilly*, C-336/96, EU:C:1998:221, paragraph 31, and of 24 October 2018, *Sauvage and Lejeune*, C-602/17, EU:C:2018:856, paragraph 23).

19 Consequently, where, in a convention on double taxation concluded between the Member States, the criterion of nationality appears in a provision which is intended to allocate fiscal sovereignty, there is no justification for considering such differentiation on the basis of nationality as constituting prohibited discrimination (judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 38 and the case-law cited).

20 Similarly, the designation of the State responsible for payment of the retirement pension (‘the paying State’) as being competent to tax pensions received from the public sector cannot, in itself, have negative repercussions for the taxpayers concerned, in so far as the favourable or unfavourable nature of the tax treatment of those taxpayers does not derive strictly speaking from the choice of connecting factor, but from the level of taxation of the competent State, in the absence of

harmonisation, at EU level, of the scales of direct taxes (see, to that effect, judgment of 12 May 1998, *Gilly*, C-336/96, EU:C:1998:221, paragraph 34).

21 It follows from an application to the circumstances of the main proceedings of the principles identified in the case-law of the Court, referred to in paragraphs 16 to 20 of the present judgment, that the difference in treatment which the applicants in the main proceedings claim to have suffered arises from the allocation of the power to impose taxes between the parties to the Italian-Portuguese Convention and from the disparities existing between the respective tax systems of those contracting parties. The choice of various connecting factors, made by those parties for the purpose of allocating powers of taxation between them, such as, in the present case, the State responsible for paying the retirement pension and nationality, must not be regarded, as such, as constituting discrimination prohibited by Articles 18 TFEU and 21 TFEU (see, by analogy, judgment of 19 November 2015, *Bukovansky*, C-241/14, EU:C:2015:766, paragraph 45).

22 In the light of all the foregoing considerations, the answer to the question referred is that Articles 18 TFEU and 21 TFEU do not preclude a tax scheme resulting from a double taxation convention concluded between two Member States, pursuant to which the powers of taxation of those States in relation to the taxation of retirement pensions are allocated according to whether the recipients of those pensions were in employment in the private sector or in the public sector and, in the latter case, depending on whether or not they are nationals of the Member State of residence.

Costs

23 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring 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 (Eighth Chamber) hereby rules:

Articles 18 TFEU and 21 TFEU do not preclude a tax regime resulting from a convention for the avoidance of double taxation concluded between two Member States, pursuant to which the powers of taxation of those States in relation to the taxation of retirement pensions are allocated according to whether the recipients of those pensions were in employment in the private sector or the public sector and, in the latter case, according to whether or not they are nationals of the Member State of residence.

[Signatures]

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* Language of the case: Italian.