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Provisional text

JUDGMENT OF THE COURT (Eighth Chamber)

5 March 2020 (*)

(Reference for a preliminary ruling — Social security for migrant workers — Coordination of social security systems — Regulation (EC) No 883/2004 — Articles 3 and 11 — Matters covered — Benefits falling within the scope of the regulation — Classification — Sickness benefit — Invalidity benefit — Unemployment benefit — Person who has ceased to be insured under the social security system of a Member State after ceasing to be employed there and moving his or her place of residence to another Member State — Application for a rehabilitation allowance in the former Member State of residence and employment — Refusal — Determination of the legislation applicable)

In Case C-135/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 19 December 2018, received at the Court on 20 February 2019, in the proceedings

Pensionsversicherungsanstalt

v

CW,

THE COURT (Eighth Chamber),

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

Advocate General: H. Saugmandsgaard Øe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Pensionsversicherungsanstalt, by J. Milchram, A. Ehm and T. Mödlagl, Rechtsanwälte,
- CW, by A. Pfeiffer, Rechtsanwalt,
- the Austrian Government, by J. Schmoll, acting as Agent,
- the European Commission, by M. Van Hoof 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 This request for a preliminary ruling concerns the interpretation 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 (OJ 2004 L 166, p. 1; and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2012 L 149, p. 4) ('Regulation No 883/2004').

2 The request has been made in proceedings between the Pensionsversicherungsanstalt (Pension Insurance Institution, Austria) and CW concerning the grant of a rehabilitation allowance.

Legal context

European Union law

3 Article 3 of Regulation No 883/2004, entitled 'Matters covered', provides, in paragraph 1 thereof:

'This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness benefits;

...

(c) invalidity benefits;

...

(h) unemployment benefits;

...'

4 Article 11 of that regulation, which lays down the general rules for determining the legislation applicable, provides, in paragraphs 1 to 3 thereof:

'1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

(b) a civil servant shall be subject to the legislation of the Member State to which the administration employing him/her is subject;

(c) a person receiving unemployment benefits in accordance with Article 65 under the legislation of the Member State of residence shall be subject to the legislation of that Member State;

(d) a person called up or recalled for service in the armed forces or for civilian service in a Member State shall be subject to the legislation of that Member State;

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him/her benefits under the legislation of one or more other Member States.'

Austrian law

5 The Allgemeines Sozialversicherungsgesetz (General Law on social security, BGBl. 189/1955), in the version prior to the entry into force on 1 January 2014 of the Sozialrechts-Änderungsgesetz 2012 (Law of 2012 amending social legislation, BGBl. I, 3/2013), provided that an invalidity pension could also be granted, for a fixed period, to insured persons born after 31 December 1963 who were suffering from temporary invalidity.

6 The General Law on social security, in the version resulting from the Law of 2012 amending social legislation ('the ASVG'), now restricts entitlement to an invalidity pension to those who are no longer employable on the labour market, primarily because the invalidity is expected to be permanent, and provides for the payment, in cases of temporary invalidity, of a rehabilitation allowance and a retraining allowance.

7 The rehabilitation allowance is paid by the competent sickness insurance institution while the person concerned is undergoing medical rehabilitation.

8 Under point 1(d) of Paragraph 8(1) of the ASVG, recipients of the rehabilitation allowance are only partially covered under the statutory social security scheme, that is to say, they have only sickness insurance.

9 Paragraph 143a of the ASVG, on the rehabilitation allowance, states, in subparagraphs 1 and 2 thereof:

'(1) Persons in respect of whom, upon application, it has been established via official decision that [their situation of temporary invalidity is expected to last for a period of at least six months and

that they are not eligible for occupational rehabilitation measures or a retirement pension] shall be entitled to the rehabilitation allowance for the duration of the temporary invalidity (incapacity for work) with effect from the relevant date ... The continued existence of the temporary invalidity (incapacity for work) is to be checked by the sickness insurance institution as part of case management whenever required, but in any event at the end of a period of one year of the rehabilitation allowance being granted by the last appraisal, specifically via the Kompetenzzentrum Begutachtung (Competence Centre for appraisals) ... The determination as to whether there is entitlement to the rehabilitation allowance and as to its withdrawal is made by decision of the pension insurance institution.

(2) The rehabilitation allowance is payable up to the amount of the sickness benefit ... and, from the 43rd day, the amount of the increased sickness benefit ..., which would have been payable on the basis of the last [activity as an employed person warranting] compulsory insurance under the sickness insurance scheme ...'

10 Paragraph 143b of the ASVG, on case management, provides:

'The sickness insurance institutions must fully support the persons insured under the statutory insurance scheme referred to in point 1(d) of Paragraph 8(1) in order to guarantee a medically state-of-the-art treatment process for the transition period between medical treatment and rehabilitation for restoring capacity for work and to ensure that the necessary steps of providing care are executed in an optimal manner. In this context, during the medical treatment and rehabilitation for restoring capacity to work, the insured person must be supported in the coordination of the further steps to be taken, and monitored in such a way that an individual care plan is created following an appropriate assessment of needs and implemented by the individual service providers. In the context of the case management, consideration should be given to the fact that the insured persons are required to undergo regular appraisals in the Competence Centre for appraisals ... To that end, the sickness insurance institutions must consult in good time with the competent employment service and pension insurance institution. The pension insurance institution may request that an appraisal be drawn up by the Competence Centre for appraisals in the context of the case management system.'

11 Under Paragraph 255b of the ASVG, an insured person's entitlement to a rehabilitation allowance is subject, inter alia, to the condition that his or her temporary invalidity is expected to last for at least six months.

The facts in the main proceedings and the questions referred for a preliminary ruling

12 The respondent in the main proceedings, who was born in 1965, is an Austrian national.

13 After residing and working in Austria, in 1990 the person concerned moved her place of residence to Germany, where she has been living since then and where she worked until 2013. She completed 59 months and 235 months of insurance in Austria and in Germany, respectively.

14 On 18 June 2015, as she was no longer insured under the Austrian statutory social security scheme since moving to Germany, the respondent in the main proceedings applied to the Pension Insurance Institution for an invalidity pension or, in the alternative, medical rehabilitation measures and a rehabilitation allowance or, in the further alternative, occupational rehabilitation measures.

15 The Pension Insurance Institution rejected the application on the ground that the respondent in the main proceedings was not suffering from invalidity and that, in any event, she was not

covered by the Austrian statutory social security scheme and had not demonstrated sufficiently close ties with that scheme.

16 The respondent in the main proceedings brought an action against that refusal before the Landesgericht Salzburg als Arbeits- und Sozialgericht (Regional Court, Salzburg, sitting as a Labour and Social Court, Austria).

17 By judgment of 29 September 2017, that court recognised that, as from 18 June 2015, the respondent in the main proceedings had suffered temporary invalidity that was expected to last for at least six months and held that she had a right to receive, from the Austrian social security system, medical rehabilitation measures and a rehabilitation allowance for the duration of her temporary invalidity. On the other hand, that court dismissed the action as regards the application for an invalidity pension and for occupational rehabilitation measures.

18 By judgment of 17 January 2018, the Oberlandesgericht Linz als Berufungsgericht in Arbeits- und Sozialrechtssachen (Higher Regional Court, Linz, sitting as the Labour and Social Appeal Court, Austria) dismissed the appeal brought by the Pension Insurance Institution against that judgment.

19 The Pension Insurance Institution brought an appeal on a point of law (*Revision*) before the Oberster Gerichtshof (Supreme Court, Austria) seeking dismissal of the application lodged by the respondent in the main proceedings in its entirety.

20 The referring court notes that the respondent in the main proceedings claims to be unable to work and to have close ties with Austria in that she is a national of that Member State, has completed periods of insurance there, lives near Austria and has regular contact with members of her family living there.

21 The referring court considers that, in accordance with the criteria established in the Court's case-law for distinguishing between the different types of benefits provided for by Regulation No 883/2004, the rehabilitation allowance is in fact a sickness benefit, within the meaning of Article 3(1)(a) of that regulation.

22 Apart from the fact that it covers the risk of temporary disability, not permanent or long-term disability, that allowance is closely connected with medical rehabilitation measures aimed at recovering skills and is intended to provide compensation for the loss of income during the period in which the person concerned has to undergo medical rehabilitation measures. Lastly, the method of calculating that allowance is based on the method for calculating the sickness allowance.

23 Thus, for the referring court, if the Court were to consider that the rehabilitation allowance is in fact a sickness benefit, the respondent in the main proceedings, who resides in Germany, would be covered not by Austrian legislation but by German legislation. In accordance with Article 11(3) (e) of Regulation No 883/2004, it is the Member State of residence which is competent with regard to sickness benefits.

24 However, the referring court observes that the rehabilitation allowance has certain characteristics which could bring it closer to an invalidity benefit. Thus, eligibility for that allowance is conditional upon compulsory insurance (sickness and pension insurance) contributions having been paid and it is not granted until a certain qualifying period has been fulfilled. Moreover, it can be claimed only by submitting an invalidity pension application to the pension insurance institution.

25 The referring court adds, however, that the rehabilitation allowance differs from a pension or care allowance benefit in terms of its structure and purpose. The Court has held that, unlike sickness benefits, care allowance benefits are not in principle intended to be paid on a short-term basis (see, to that effect, judgment of 30 June 2011, *da Silva Martins*, C-388/09, EU:C:2011:439, paragraphs 48 and 77 to 79). The rehabilitation allowance is not intended to be long-term and medical rehabilitation measures are intended to enable the reintegration of the person concerned into the national labour market in the foreseeable future and thus avoid long-term incapacity for work.

26 Furthermore, the referring court considers that although, bearing in mind its purpose, the rehabilitation allowance could, *prima facie*, be regarded as akin to an unemployment benefit, within the meaning of Article 3(1)(h) of Regulation No 883/2004 (judgment of 4 June 1987, *Campana*, 375/85, EU:C:1987:253), such a classification must, in fact, be ruled out because there is no link between entitlement to the rehabilitation allowance and unemployment or the threat of unemployment.

27 The referring court adds that, although there is, *a priori*, no benefit comparable to the Austrian rehabilitation allowance in Germany, that is not such as to restrict freedom of movement in a situation such as that at issue in the main proceedings.

28 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Pursuant to the provisions of Regulation [No 883/2004], is the Austrian rehabilitation allowance to be regarded as:

- a sickness benefit pursuant to Article 3(1)(a) of the regulation, or
- an invalidity benefit pursuant to Article 3(1)(c) of the regulation, or
- an unemployment benefit pursuant to Article 3(1)(h) of the regulation?

(2) In the light of primary law, is Regulation [No 883/2004] to be interpreted as meaning that, as the former State of residence and State of employment, a Member State is obliged to pay benefits such as the Austrian rehabilitation allowance to a person who is resident in another Member State if that person completed the majority of the periods of insurance from the sickness and pension branches as an employee in that other Member State (after the transfer of residence to that country years previously) and has not since then received benefits from the health and pension insurance scheme of the former State of residence and employment?’

The questions referred

The first question

29 By its first question, the referring court asks, in essence, whether a benefit such as the rehabilitation allowance at issue in the main proceedings is a sickness benefit, an invalidity benefit or an unemployment benefit, within the meaning of Article 3(1)(a), (c) and (h) of Regulation No 883/2004.

30 It must be recalled that, according to settled case-law, social security benefits must be regarded, irrespective of the characteristics specific to different national legal systems, as being of

the same kind when their purpose and subject matter as well as the basis on which they are calculated and the conditions for granting them are identical. On the other hand, characteristics which are purely formal must not be considered relevant criteria for the classification of benefits (judgment of 30 May 2018, *Czerwiński*, C-517/16, EU:C:2018:350, paragraph 43 and the case-law cited).

31 Where it is necessary to distinguish between different categories of social security benefits, the risk covered by each benefit must be taken into consideration (judgment of 30 May 2018, *Czerwiński*, C-517/16, EU:C:2018:350, paragraph 44 and the case-law cited).

32 Thus, a sickness benefit, within the meaning of Article 3(1)(a) of Regulation No 883/2004, covers the risk connected to a state of ill health involving temporary suspension of the concerned person's activities (see, by analogy, judgment of 21 July 2011, *Stewart*, C-503/09, EU:C:2011:500, paragraph 37).

33 By contrast, an invalidity benefit, within the meaning of Article 3(1)(c) of that regulation, is intended, as a general rule, to cover the risk of disability of a stipulated degree, where it is probable that such disability will be permanent or long-term (see, by analogy, judgment of 21 July 2011, *Stewart*, C-503/09, EU:C:2011:500, paragraph 38 and the case-law cited).

34 An unemployment benefit covers the risk associated with the loss of income suffered by a worker following the loss of his or her employment, even though he or she is still able to work. A benefit granted if that risk, namely loss of employment, materialises and which is no longer payable if that situation ceases to exist as a result of the claimant's engaging in paid employment must be regarded as constituting an unemployment benefit (judgment of 19 September 2013, *Hliddal and Bornand*, C-216/12 and C-217/12, EU:C:2013:568, paragraph 52 and the case-law cited).

35 It is in the light of those considerations that it is necessary to examine whether a benefit such as that at issue in the main proceedings must be regarded as a sickness benefit, an invalidity benefit or an unemployment benefit, within the meaning of Article 3(1)(a), (c) and (h) of Regulation No 883/2004.

36 First, it is apparent from the order for reference that the rehabilitation allowance is payable irrespective of whether the person concerned is pursuing an occupational activity, and therefore that benefit cannot be classified as an unemployment benefit, within the meaning of Article 3(1)(h) of that regulation.

37 As regards the classification of the rehabilitation allowance as an invalidity benefit or sickness benefit, it should be noted that, under Paragraph 255b of the ASVG, the rehabilitation allowance is paid in cases of invalidity expected to last for at least six months and where the person concerned is not eligible for entitlement to a retirement pension.

38 In addition, in accordance with Paragraph 143a(1) of the ASVG, regular checks are to be carried out to ascertain whether a person is still suffering temporary invalidity and, if it is found that the invalidity has ceased, entitlement to the rehabilitation allowance is to be suspended or ended.

39 It follows that a benefit such as the rehabilitation allowance at issue in the main proceedings is intended to cover the risk of temporary disability and must therefore be regarded as a sickness benefit, within the meaning of Article 3(1)(a) of that regulation.

40 That conclusion is supported by the fact that, under Paragraph 143a(1) and (2) and Paragraph 143b of the ASVG, the rehabilitation allowance is paid by the sickness insurance institution and that the amount of that allowance is based on that of the sickness allowance.

41 Consequently, the answer to the first question is that a benefit such as the rehabilitation allowance at issue in the main proceedings is a sickness benefit, within the meaning of Article 3(1) (a) of Regulation No 883/2004.

The second question

42 By its second question, the referring court asks, in essence, whether Regulation No 883/2004 must be interpreted as precluding a situation, such as that at issue in the main proceedings, in which a person who has ceased to be insured under the social security system of his or her Member State of origin after ceasing to be employed there and moving his or her place of residence to another Member State, where he or she worked and completed the majority of his or her periods of insurance, is refused a benefit such as the rehabilitation allowance at issue in the main proceedings by the competent institution of his or her Member State of origin.

43 It is clear from the Court's settled case-law that, although it is for the legislation of each Member State to lay down the conditions for creating the right to become affiliated to a social security scheme, the Member States are nevertheless required to abide by the provisions of EU law in force when setting those conditions. In particular, the conflict rules laid down by Regulation No 883/2004 are mandatory for the Member States, and the latter do not therefore have the option to determine to what extent their own legislation or that of another Member State is applicable (judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 45 and the case-law cited).

44 Accordingly, the conditions establishing the right of a person to be affiliated to a social security scheme cannot have the effect of excluding from the scope of the legislation at issue persons to whom, pursuant to Regulation No 883/2004, that legislation is applied (judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 46 and the case-law cited).

45 It should also be borne in mind that, under Article 11(1) of Regulation No 883/2004, persons to whom that regulation applies are to be subject to the legislation of a single Member State only, that legislation being determined in accordance with Title II of that regulation.

46 The provisions of Title II of Regulation No 883/2004, of which Articles 11 to 16 form part, constitute a complete and uniform system of conflict rules which are intended not only to prevent the simultaneous application of a number of national legislative systems and the complication which might ensue, but also to ensure that the persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them (judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 33 and the case-law cited).

47 More particularly, as regards Article 11(3) of Regulation No 883/2004, the Court has held that the purpose of that provision is to determine, subject to Articles 12 to 16 of that regulation, the national legislation applicable to persons who are in one of the situations referred to in subparagraphs (a) to (e) of Article 11(3) (judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraph 34 and the case-law cited).

48 As regards the situation at issue in the main proceedings, it is apparent from the order for reference that the respondent in the main proceedings, who is an Austrian national, resides in Germany, where she has not worked since 2013.

49 A person such as the respondent in the main proceedings does not, a priori, come under the special rules laid down by Articles 12 to 16 of Regulation No 883/2004, which relate to persons who have been posted, those pursuing an activity in two or more Member States, those who elected for voluntary or optional insurance, or those who are members of the contract staff of the European institutions, and nor is such a person covered by the situations provided for in Article 11(3)(a) to (d) of that regulation, which concern persons pursuing an activity as an employed or self-employed person in a Member State, civil servants, persons receiving unemployment benefits, or persons called up or recalled for service in the armed forces or for civilian service in a Member State, which is, however, a matter for the referring court to ascertain.

50 Therefore, the respondent in the main proceedings falls within the scope of Article 11(3)(e) of Regulation No 883/2004, which applies to all persons other than those covered by Article 11(3)(a) to (d) of that regulation, including, inter alia, persons who are not economically active (see, to that effect, judgment of 8 May 2019, *Inspecteur van de Belastingdienst*, C-631/17, EU:C:2019:381, paragraphs 35 and 40).

51 Under Article 11(3)(e) of Regulation No 883/2004, the national legislation applicable to a situation such as that at issue in the main proceedings is that of the Member State of residence of the person concerned, namely, in the present case, German legislation.

52 In the light of the rule, set out in Article 11(1) of Regulation No 883/2004, recalled in paragraph 45 above, that the social security legislation of a single Member State is to apply, and the rule, set out in Article 11(3)(e) of that regulation, that a person who does not pursue an activity as an employed or self-employed person is subject only to the social security legislation of the Member State of residence (judgment of 23 January 2019, *Zyla*, C-272/17, EU:C:2019:49, paragraph 41), a person who is in a situation in which, as in the case in the main proceedings, he or she has ceased to be insured under the social security system of his or her Member State of origin after ceasing to be employed there and moving his or her place of residence to another Member State, is no longer covered by the social security system of his or her State of origin.

53 Thus, in the present case, in the light of the Court's case-law cited in paragraphs 43, 44 and 46 above, the competent institution of the Member State of origin, namely the Republic of Austria, cannot be criticised for refusing to grant the respondent in the main proceedings the rehabilitation allowance. That refusal did not have the effect of excluding from the scope of the legislation at issue a person to whom that legislation is applicable pursuant to Regulation No 883/2004 and, therefore, of leaving him or her without social security cover because there is no legislation which is applicable to him or her.

54 It follows from the foregoing that Regulation No 883/2004 must be interpreted as not precluding a situation in which a person who has ceased to be insured under the social security system of his or her Member State of origin after ceasing to be employed there and moving his or her place of residence to another Member State, where he or she worked and completed the majority of his or her periods of insurance, is refused a benefit such as the rehabilitation allowance at issue in the main proceedings by the competent institution of his or her Member State of origin, since that person is subject not to the legislation of the State of origin but to that of the Member State in which his or her place of residence is situated.

Costs

55 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 (Eighth Chamber) hereby rules:

- 1. A benefit such as the rehabilitation allowance at issue in the main proceedings is a sickness benefit, within the meaning of Article 3(1)(a) 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, as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012.**
- 2. Regulation No 883/2004, as amended by Regulation No 465/2012, must be interpreted as not precluding a situation in which a person who has ceased to be insured under the social security system of his or her Member State of origin after ceasing to be employed there and moving his or her place of residence to another Member State, where he or she worked and completed the majority of his or her periods of insurance, is refused a benefit such as the rehabilitation allowance at issue in the main proceedings by the competent institution of his or her Member State of origin, since that person is subject not to the legislation of the State of origin but to that of the Member State in which his or her place of residence is situated.**

[Signatures]

* Language of the case: German.