Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

24 October 2019*

(Reference for a preliminary ruling — Free movement of workers — Equal treatment — Income tax — National legislation — Tax exemption for disability allowances — Allowances received in another Member State — Not included — Difference in treatment)

In Case C-35/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Tribunal de première instance de Liège (Court of First Instance, Liège, Belgium), made by decision of 7 January 2019, received at the Court on 21 January 2019, in the proceedings

BU

v

État belge,

THE COURT (Eighth Chamber),

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

Advocate General: E. Sharpston,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

BU, by M. Levaux, avocat,

the Belgian Government, by P. Cottin, J.-C. Halleux and C. Pochet, 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

* Language of the case: French.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 45 and 56 TFEU.

2 The request has been made in proceedings between BU and État belge (the Belgian State) concerning the taxation of allowances received by BU in the Netherlands.

Legal context

3 Under Article 38(1)(4) of the code des impôts sur le revenue (Income Tax Code) 1992, in the version applicable to the facts in the main proceedings:

‘1. The following are exempt:

…

4 Allowances, paid by the State Treasury, granted to persons with disabilities, in accordance with the relevant legislation’.

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

4 The applicant in the main proceedings, born in the United States, has lived in Belgium since 1973 and acquired Belgian nationality in 2009.

5 In 1996 she suffered an accident in Belgium on her way to work in Limburg in the Netherlands. That accident led to incapacity for work following which she was dismissed from her employment in 2000.

6 As the applicant in the main proceedings worked in the Netherlands at the time she had her accident, she is covered by Netherlands social security and, since the accident, has received an allowance under the Wet arbeidsongeschiktheid (WAO) (Law on insurance against incapacity for work) (‘the WAO allowance’) and an allowance on the basis of the Algemeen Burgerlijk Pensioenfond (ABP) (pension fund for civil servants including old-age, survivors’ and invalidity pensions) (‘the ABP allowance’).

7 By letter of 23 August 2016, the Belgian tax authorities sent the applicant in the main proceedings a revised assessment of her personal income tax return for the tax year 2014, stating that those allowances are received as pensions and are taxable in Belgium as such.

8 By letter of 16 December 2016, the applicant in the main proceedings lodged a complaint against that decision claiming that those allowances are exempt from taxation in Belgium since the WAO allowance is, in her view, not a pension but a disability allowance, just as the ABP allowance is a pension linked to disability.

9 Although, subsequently, the applicant in the main proceedings accepted the taxation of the ABP allowance in Belgium, she contested its classification by the Belgian tax authorities and has maintained her position that the WAO allowance is not taxable in Belgium.

10 By decision of 14 June 2017, the complaint lodged by the applicant in the main proceedings was rejected on the ground that she had not provided evidence of her disability or evidence that the WAO allowance received in the Netherlands is a disability allowance. Accordingly, the Belgian tax authorities retained the classification of those allowances as ‘allowances for incapacity to work’, which is included among the pensions that are taxable in Belgium.

11 The applicant in the main proceedings challenged the decision of the Belgian tax authorities before the Tribunal de première instance de Liège (Court of First Instance, Liège, Belgium).

12 The referring court indicates that the dispute in the main proceedings concerns whether the WAO allowance received by the applicant in the Netherlands is taxable in Belgium.

13 According to that court, it is clear from the documents submitted by the applicant in the main proceedings that that allowance is intended to compensate for loss of income linked to disability, in as much as it is calculated by reference to the salary the applicant in the main proceedings received before her accident compared with the salary she is able to receive taking into account her current abilities.

14 The referring court considers that the WAO allowance is intended to encourage persons with a disability to work as far as their remaining capacity allows them by providing them with an allowance intended to compensate for the loss of income due to the reduction of their capacity to work. As a result, the WAO allowance paid to the applicant in the main proceedings amounts to a disability allowance and not to a pension.

15 That court states that the Belgian legislation at issue establishes a tax exemption for disability allowances that applies only when those allowances are paid by the State Treasury, with the result that, although the WAO allowance received by the applicant in the main proceedings does amount to a disability allowance, the applicant cannot benefit from that exemption.

16 The referring court states that, even if, as the Belgian Government claims, the applicant in the main proceedings had made an application in Belgium for a disability allowance so that she could have benefited from the tax exemption — something she did not do — the applicant in the main proceedings had in fact no interest in doing this as she already received such an allowance in the Netherlands. In addition, it is not certain that she could have obtained such an allowance in Belgium.

17 Therefore, the referring court takes the view that the Belgian legislation at issue may hinder the free movement of workers in so far as it treats disability allowances received by Belgian residents differently according to whether they are paid by the Belgian State or by another Member State.

18 In those circumstances, the Tribunal de première instance de Liège (Court of First Instance, Liège) decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Does Article 38[(1)(4) of the Income Tax Code 1992, in the version applicable to the facts in the main proceedings] infringe Article 45 TFEU et seq. (principle of free movement of workers) and Article 56 TFEU et seq. (principle of freedom to provide services) […] in so far as it exempts disability allowances from tax only if those allowances are paid by the State Treasury, that is to say, by the Belgian State, in accordance with Belgian legislation, thereby giving rise to discrimination between taxpayers resident in Belgium who receive disability allowances paid by the Belgian State, which are exempt from tax, and taxpayers resident in Belgium who receive allowances intended to compensate for a disability paid by another Member State of the European Union, which are not exempt from tax?’

Consideration of the question referred

19 As a preliminary point, it is important to note that, in its question, the referring court refers both to the principle of the free movement of workers enshrined in Article 45 TFEU and the principle of the freedom to provide services enshrined in Article 56 TFEU.

20 Where a national measure affects both the free movement of workers and the freedom to provide services the Court will, in principle, examine it in relation to only one of those two fundamental freedoms where it is shown that, in the circumstances of the case, one of them is entirely secondary in relation to the other and may be considered together with it (see, to that effect, judgment of 14 October 2004, *Omega*, C-36/02, EU:C:2004:614, paragraph 26 and the case-law cited).

21 In the present case, it should be noted that neither the order for reference nor the file submitted to the Court contains evidence that the freedom to provide services is relevant in the case in the main proceedings.

22 By contrast, it is clear from the order for reference that the applicant in the main proceedings is covered by the scope of Article 45 TFEU since she exercised her right to freedom of movement for workers and for many years carried out a professional activity in a Member State other than that of her residence.

23 In accordance with settled case-law, any national of the European Union who, irrespective of his or her place of residence and nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of his or her residence comes within the scope of Article 45 TFEU (judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 21 and the case-law cited).

24 It follows that, in the circumstances of the case in the main proceedings, and in the light of the information available to the Court, it is necessary to examine the question referred for a preliminary ruling with regard to the free movement of workers.

25 Against that background, it must be understood that, by its question, the referring court is asking, in essence, whether Article 45 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of the Member State concerned and, therefore, excludes from that exemption allowances of the same nature paid by another Member State.

Admissibility

26 The Belgian Government submits that the factual assessment made by the referring court in the request for a preliminary ruling, according to which the WAO allowance received by the applicant in the main proceedings constitutes a disability allowance of the same nature as Belgian disability allowances which benefit from the tax exemption under Belgian law, is incorrect.

27 By that argument the Belgian Government seeks to challenge the premiss on which this request for a preliminary ruling is based and, accordingly, its admissibility.

28 In that regard, it is sufficient to state that, in accordance with the Court's settled case-law, in the preliminary ruling procedure under Article 267 TFEU, based on a clear separation of functions between the national courts and the Court of Justice, the national court alone has jurisdiction to find and assess the facts in the dispute in the main proceedings. In that context, the Court is empowered to rule solely on the interpretation or validity of EU law in the light of the factual and legal situation as described by the referring court, in order to provide that court with such guidance as will assist it in resolving the dispute before it (judgment of 20 December 2017, *Schweppes*, C-291/16, EU:C:2017:990, paragraph 21 and the case-law cited).

29 Accordingly, questions on the interpretation of EU law referred by a national court in the factual and legislative context which that court is responsible for defining, and the accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. That presumption of relevance cannot be rebutted by the simple fact that one of the parties to the main proceedings contests certain facts, the accuracy of which is not a matter for the Court to determine and on which the delimitation of the subject matter of those proceedings depends (see, to that effect, judgment of 14 April 2016, *Polkomtel*, C-397/14, EU:C:2016:256, paragraphs 37 and 38).

30 As it is not for the Court to call into question the findings of fact on which the present request for a preliminary ruling is based — in the present case the nature of the allowance from the Netherlands granted to the applicant in the main proceedings — it is necessary, in the context of giving an answer to the question referred, to consider that the WAO allowance received by the applicant in the main proceedings is a disability allowance of the same nature as Belgian disability allowances which benefit from tax exemption under Belgian law, a matter which, in the present case, is for the referring court to verify.

Substance

The existence of a restriction of Article 45 TFEU

31 It is important to note, from the outset, that it has been consistently held that, whilst direct taxation falls within their competence, the Member States must nonetheless exercise that competence consistently with EU law (see, to that effect, judgment of 23 January 2014, *Commission* v *Belgium*, C-296/12, EU:C:2014:24, paragraph 27 and the case-law cited). Thus, although the Member States are at liberty, in the framework of bilateral agreements for the avoidance of double taxation, to determine the connecting factors for the purposes of allocating powers of taxation, that allocation of powers of taxation does not allow them to apply measures that are contrary to the freedoms of movement guaranteed by the TFEU. As far as concerns the exercise of the power of taxation thus allocated, the Member States must comply with EU rules (see, to that effect, judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 25 and the case-law cited).

32 In the present case the Belgian legislation at issue in the main proceedings explicitly provides that only disability allowances paid by the State Treasury are exempted from tax. That legislation therefore excludes from that exemption disability allowances paid by a Member State other than the Belgium State.

33 The Belgian legislation at issue in the main proceedings thus establishes a difference in treatment between Belgian residents on the basis of the origin of their income, which is liable to hinder the exercise, by the latter, of their right to freedom of movement as workers, enshrined in Article 45 TFEU.

34 The Court has already ruled that Article 45 TFEU precludes legislation which establishes a difference in tax treatment between EU-citizen couples residing in Belgium according to the source of their incomes — a difference which is liable to discourage those citizens from exercising the freedoms guaranteed by the Treaty and, in particular, the free movement of workers guaranteed by Article 45 TFEU (judgments of 12 December 2013, *Imfeld and Garcet*, C-303/12, EU:C:2013:822, paragraphs 51 and 52, and of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 43 and the operative part).

35 Therefore, the national legislation at issue in the main proceedings constitutes a restriction on the free movement of workers which is prohibited, in principle, by Article 45 TFEU.

The existence of a justification

36 According to settled case-law, a measure which is liable to hinder the free movement of workers enshrined in Article 45 TFEU can be permissible only if it pursues a legitimate objective which is compatible with the Treaty and justified by overriding reasons in the public interest. It is also necessary, in such a case, that its application be appropriate for ensuring the attainment of the objective thus pursued and not go beyond what is necessary to attain that objective (see, to that effect, judgment of 14 March 2019, *Jacob and Lennertz*, C-174/18, EU:C:2019:205, paragraph 44 and the case-law cited).

37 In the present case, the referring court has not provided any justification, and the Belgian Government, which in the proceedings before the Court merely challenges the nature of the allowances from the Netherlands granted to the applicant in the main proceedings, has not put forward other justifications.

38 Accordingly, the Court can only conclude that there is no justification, a matter which will be for the referring court to verify.

39 In the light of all the foregoing, the answer to the question referred is that Article 45 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, without providing justification in that regard, a matter which is however for the referring court to verify, provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of the Member State concerned and, therefore, excludes from that exemption allowances of the same nature paid by another Member State, even where the recipient of those allowances is a resident of the Member State concerned.

Costs

40 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:

Article 45 TFEU must be interpreted as precluding legislation of a Member State, such as that at issue in the main proceedings, which, without providing justification in that regard, a matter which is however for the referring court to verify, provides that the tax exemption applicable to disability allowances is subject to the condition that those allowances are paid by a body of the Member State concerned and, therefore, excludes from that exemption allowances of the same nature paid by another Member State, even where the recipient of those allowances is a resident of the Member State concerned.

[Signatures]