ECLI:EU:C:2024:292

Provisional text

JUDGMENT OF THE COURT (Seventh Chamber)

11 April 2024 (*)

(Reference for a preliminary ruling – Social security – Migrant workers – Family benefits – Regulation (EC) No 883/2004 – Article 3 – Sickness benefits – Scope – Care leave allowance – National of a Member State residing and working in another Member State and caring for a family member in the first Member State – Ancillary nature in respect of the care allowance – Article 4 – Equality of treatment)

In Case C-116/23,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesverwaltungsgericht (Federal Administrative Court, Austria), made by decision of 23 February 2023, received at the Court on 27 February 2023, in the proceedings

XXXX,

interested party:

Sozialministeriumservice,

THE COURT (Seventh Chamber),

composed of F. Biltgen, President of the Chamber, N. Wahl and M.L. Arastey Sahún (Rapporteur), Judges,

Advocate General: J. Richard de la Tour,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– XXXX, by K. Mayr and D. Menkovic, acting as Agents,

– the Austrian Government, by J. Schmoll and C. Leeb, acting as Agents,

– the Czech Government, by M. Smolek and J. Vláčil, acting as Agents,

– the European Commission, by F. Clotuche-Duvieusart 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 Article 18 TFEU, Article 7 of the Charter of Fundamental Rights of the European Union ('the Charter'), Articles 3, 4, 7 and 21 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), and the principle of effectiveness.

2 The request has been made in proceedings between XXXX and the Sozialministeriumservice (Department of the Ministry of Social Affairs, Austria) ('the ministerial department') concerning the latter's refusal to grant XXXX a care leave allowance.

Legal context

European Union law

Regulation No 883/2004

3 Recitals 8, 9, 12 and 16 of Regulation No 883/2004 read as follows:

'(8) The general principle of equal treatment is of particular importance for workers who do not reside in the Member State of their employment, including frontier workers.

(9) The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.

…

(12) In the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period.

…

(16) Within the Community there is in principle no justification for making social security rights dependent on the place of residence of the person concerned; nevertheless, in specific cases, in

particular as regards special benefits linked to the economic and social context of the person involved, the place of residence could be taken into account.'

4 Article 3(1) of that regulation provides:

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

(a) sickness benefits;

…

(h) unemployment benefits;

…'

5 Article 4 of that regulation provides:

'Unless otherwise provided for by this Regulation, persons to whom this Regulation applies shall enjoy the same benefits and be subject to the same obligations under the legislation of any Member State as the nationals thereof.'

6 Article 5 of that regulation provides:

'Unless otherwise provided for by this Regulation and in the light of the special implementing provisions laid down, the following shall apply:

(a) where, under the legislation of the competent Member State, the receipt of social security benefits and other income has certain legal effects, the relevant provisions of that legislation shall also apply to the receipt of equivalent benefits acquired under the legislation of another Member State or to income acquired in another Member State;

(b) where, under the legislation of the competent Member State, legal effects are attributed to the occurrence of certain facts or events, that Member State shall take account of like facts or events occurring in any Member State as though they had taken place in its own territory.'

7 Under Article 7 of Regulation No 883/2004:

'Unless otherwise provided for by this Regulation, cash benefits payable under the legislation of one or more Member States or under this Regulation shall not be subject to any reduction, amendment, suspension, withdrawal or confiscation on account of the fact that the beneficiary or the members of his/her family reside in a Member State other than that in which the institution responsible for providing benefits is situated.'

8 Article 11 of that regulation provides:

'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.

…

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;

…'

9 Article 21 of that regulation provides:

'1. An insured person and members of his/her family residing or staying in a Member State other than the competent Member State shall be entitled to cash benefits provided by the competent institution in accordance with the legislation it applies. By agreement between the competent institution and the institution of the place of residence or stay, such benefits may, however, be provided by the institution of the place of residence or stay at the expense of the competent institution in accordance with the legislation of the competent Member State.

…'

Regulation (EU) No 492/2011

10 Article 7(1) and (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 (OJ 2011 L 141, p. 1) provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and, should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.'

Austrian law

THE AVRAG

11 Paragraph 14a(1) of the Arbeitsvertragsrechts-Anpassungsgesetz (Law adapting employment contract law, BGBl. 459/1993), in the version applicable to the dispute in the main proceedings ('the AVRAG'), provides:

'An employee may request, in writing, a reduction in normal working hours, a change in working hours or unpaid leave for the purposes of the end-of-life care of a close relative … who is terminally ill, for a fixed period of up to three months, specifying the beginning and duration thereof, including where the employee and the close relative are not members of the same household. …'

12 Paragraph 14c(1) of that law reads as follows:

'Provided that the employment relationship has been for a continuous period of three months, the employee and the employer may agree in writing on unpaid care leave, for a period of one to three months, for the provision of nursing care or assistance to a close relative, for the purposes of Paragraph 14a, who, on the date on which the care leave commences, is in receipt of a care allowance of level 3 or higher pursuant to paragraph 5 of the Bundespflegegeldgesetz [(Federal Law on Care Allowance, BGBl. 110/1993), in the version applicable to the dispute in the main proceedings ('the BPGG')]. …'

The BPGG

13 Paragraph 3a of the BPGG is worded as follows:

‘1. Austrian nationals whose habitual residence is in Austria are entitled to a care allowance in accordance with the provisions of this Federal Law, including where they are not in receipt of a basic allowance under Paragraph 3(1) and (2), unless another Member State is competent for providing care services pursuant to [Regulation No 883/2004] …

2. The following shall be treated in the same way as Austrian nationals:

(1) aliens not covered by any of the following points, provided that the equal treatment follows from international treaties or EU law, or

…

(3) persons who have a right of residence under EU law …

…’

14 Under Paragraph 21c of the BPGG:

‘1. Persons who have agreed on care leave pursuant to Paragraph 14c of the AVRAG … are entitled, for the duration of the care leave but not more than three months, to a care leave allowance in accordance with the provisions of this section. … There is a legal entitlement to the care leave allowance.

2. Before claiming the care leave allowance, the person taking leave must have been insured, under the employment relationship now suspended, for a continuous period of three months … with full cover … Unless otherwise provided for in this Federal Law or in a regulation adopted on the basis of subparagraph 5, the care leave allowance shall be payable to the basic amount of unemployment benefit …

3. Persons who, for the purposes of the end-of-life care of a close relative or the care of a seriously ill child, take family hospice leave

(1) pursuant to Paragraph 14a or Paragraph 14b of the AVRAG …

…

are entitled, for the duration of the family hospice leave, to a care leave allowance under this section. …’

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

15 The applicant in the main proceedings, an Italian national who has been residing and working in Austria since 2013, entered into an agreement with his employer, in accordance with Paragraph 14c(1) of the AVRAG, to take care leave for the period from 1 May 2022 to 13 June 2022, in order to care for his father, who resided in Italy.

16 On 10 May 2022, that applicant applied to the ministerial department for a care leave allowance on the basis of Paragraph 21c(1) of the BPGG, for the period from 10 May 2022 to 13 June 2022, on the ground that his father's state of health required round-the-clock care. His father, who appears to have been in receipt of a care allowance pursuant to the Italian legislation, would have been entitled, on account of his state of health, to a care allowance of level 3 on the basis of Paragraph 3a of the BPGG, had he been habitually resident in Austria.

17 The father of the applicant in the main proceedings passed away on 29 May 2022.

18 By a decision of 7 June 2022, the ministerial department rejected the application of the applicant in the main proceedings, on the ground that his father was not in receipt of a care allowance pursuant to Austrian law, whereas payment of such an allowance to the person in need of care was a necessary condition for entitlement on the part of the caregiver to the care leave allowance under the applicable Austrian legislation.

19 On 7 July 2022, the applicant in the main proceedings brought an action against that decision before the Bundesverwaltungsgericht (Federal Administrative Court, Austria), which is the referring court, claiming that the care leave allowance is not ancillary to the care allowance, since the care allowance is granted and paid to the person in need of care, whereas the care leave allowance is granted and paid to the caregiver. According to him, the care leave allowance is thus a social benefit for the caregiver, with the result that its grant is determined by that caregiver's place of work. Such a benefit should be regarded as a 'sickness benefit', within the meaning of Article 3(1)(a) of Regulation No 883/2004. Therefore, the applicant in the main proceedings submits that, since he works in Austria, the Austrian legislation which provides for that allowance is applicable to him in the present case, in accordance with Article 11(3)(a) of that regulation, and he should receive that allowance, which is in the nature of a cash benefit, pursuant to Article 21(1) thereof, even if he is staying in another Member State.

20 Furthermore, the applicant in the main proceedings submits that the interpretation set out in the ministerial department's decision of 7 June 2022 excludes, in essence, from entitlement to the care leave allowance EU nationals who are not Austrian nationals, since only those EU nationals are generally likely to have parents residing outside of Austria. That interpretation thus constitutes indirect discrimination against migrant workers or, at the very least, a restriction on the free movement of workers, contrary to Article 45 TFEU and Article 7(2) of Regulation No 492/2011.

21 The referring court states, first, that, even though the parties to the main proceedings agree in classifying the care leave allowance as a 'sickness benefit' within the meaning of Article 3(1)(a) of Regulation No 883/2004, it is also conceivable that that allowance is in the nature of an allowance for temporary absence from work, which would justify it being treated as an unemployment benefit.

22 Second, as regards the classification of the care leave allowance as a 'cash benefit', the referring court points to the case-law of the Court of Justice according to which benefits paid to the caregiver are considered to be 'sickness benefits' under Regulation No 883/2004. Since the allowance at issue is granted to the caregiver but ultimately benefits the person in need of care, it should therefore be classified not as a 'cash benefit' but as a 'benefit in kind', payable solely in respect of care for persons residing in Austria. Nevertheless, it is also conceivable that that allowance does not come within the scope of Regulation No 883/2004 but is dependent on the caregiver's status under employment law, the consequence of which would be that it would be payable if the caregiver satisfies the conditions laid down in Paragraph 21c(1) of the BPGG, irrespective of the place of residence of the person in need of care.

23 Third, the referring court asks whether the fact that the applicant in the main proceedings exercised his right to freedom of movement 10 years ago, by moving to Austria, has a bearing on the application of Regulation No 883/2004 and whether, consequently, the refusal to grant him the care leave allowance constitutes an impediment to the exercise of that right to freedom of movement.

24 Fourth, as regards the requirement laid down in Paragraph 3a of the BPGG, according to which entitlement to the Austrian care allowance is reserved to persons in need of care who are habitually resident in Austria, the referring court states that it is naturally easier for Austrian nationals to satisfy that criterion than it is for nationals of other Member States such as, in the present case, the father of the applicant in the main proceedings, who resided in Italy and appears to have been in receipt of an Italian care allowance. Thus, the referring court asks whether there is indirect discrimination, within the meaning of Article 4 of Regulation No 883/2004, based on nationality but also based on place of residence, since the requirement, in order for a claim to care leave allowance to exist, that the person in need of care should be in receipt of an Austrian care allowance of level 3 or higher, would have a greater effect on migrant workers, such as the applicant in the main proceedings, than on Austrian nationals, whose parents are generally habitually resident in Austria.

25 Fifth, the referring court seeks to ascertain, in the light of the case-law of the Verwaltungsgerichtshof (Supreme Administrative Court, Austria), from which it is apparent that every social security institution is called upon to assess applications in a spirit of a socially minded application of the law for the benefit of the insured person, the extent to which account should be taken of the fact that the applicant in the main proceedings satisfied the conditions for payment of another, more favourable national allowance, namely the family hospice leave allowance under Paragraph 21c(3) of the BPGG, which does not depend on payment of an Austrian care allowance to the person in need of care. That court is uncertain whether or not, despite the fact that that case-law is not applicable to the ministerial department, which is not a social security body, and despite the fact that the applicant in the main proceedings did not apply for that family hospice leave allowance, the situation at issue amounts to indirect discrimination, contrary to, in particular, Article 4 of Regulation No 883/2004 and Article 7 of the Charter.

26 In those circumstances the Bundesverwaltungsgericht (Federal Administrative Court) decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is the care leave allowance a sickness benefit within the meaning of Article 3 of [Regulation No 883/2004] or, if not, another benefit under Article 3 [thereof]?

(2) If it is deemed to be a sickness benefit, would the care leave allowance then be a cash benefit within the meaning of Article 21 of [Regulation No 883/2004]?

(3) Is the care leave allowance a benefit for the caregiver or the person in need of care?

(4) Consequently, does a situation in which an applicant for the care leave allowance, who is an Italian citizen, and has been permanently resident in Austria in the province of Upper Austria since 28 June 2013, and has also been continuously working in Austria in the same province with the same employer since 1 July 2013 (for which reason there is no indication that the applicant is a cross-border commuter), entered into an agreement with his employer to take care leave in order to care for his father, an Italian citizen who resided in Italy (Sassuolo), throughout the relevant period

from 1 May 2022 to 13 June 2022 and applied to the [ministerial department] for a care leave allowance, fall within the scope of [Regulation No 883/2004]?

(5) Does Article 7 of [Regulation No 883/2004] or the prohibition of discrimination enshrined in various pieces of European legislation (e.g. Article 18 TFEU, Article 4 of [Regulation No 883/2004], etc.) preclude a national provision that makes the payment of a care leave allowance conditional upon the person in need of care receiving an Austrian care allowance of level 3 or higher?

(6) Does the EU law principle of effectiveness or the EU law principle of non-discrimination enshrined in various pieces of European legislation (e.g. Article 18 TFEU, Article 4 of [Regulation No 883/2004], etc.) preclude, in a situation such as the present case, the application of national legislation or established national case-law that does not provide any scope to reclassify a "care leave allowance application" as a "family hospice leave application", when clearly a "care leave allowance application" form was used rather than the "family hospice leave application" form, and an agreement was clearly entered into with the employer that referred to "nursing care for a close relative" instead of "end-of-life care", although the underlying facts would – given that the father, who was in need of care, has subsequently passed away – in principle also satisfy the requirements for a care leave allowance under the header of "family hospice leave" if only a different agreement had been entered into with the employer and a different application had been lodged with the authority?

(7) Does Article 4 of [Regulation No 883/2004] or another provision of European Union law (for example Article 7 of [the Charter]) preclude a national provision (Paragraph 21c(1) of [the BPGG])) which makes the payment of care leave allowance conditional upon the person in need of care receiving an Austrian care allowance of level 3 or higher, whereas another national provision (Paragraph 21c(3) [of the] BPGG), when applied to the same facts, does not make the payment of the allowance conditional upon a similar requirement?'

Consideration of the questions referred

The first to fourth questions

27 By its first to fourth questions, which it is appropriate to examine together, the referring court asks, in essence, whether the concept of 'sickness benefits', within the meaning of Article 3(1)(a) of Regulation No 883/2004, must be interpreted as covering a care leave allowance paid to an employee who provides assistance to or cares for a close relative in receipt of a care allowance in another Member State and who is on unpaid leave on that basis. If so, that court seeks to ascertain whether such an allowance comes within the concept of 'cash benefits', within the meaning of that regulation.

Admissibility

28 The European Commission submits, without formally raising a plea of inadmissibility as regards those questions, that they are not relevant to the outcome of the dispute in the main proceedings, on the ground that Article 45 TFEU and Article 7 of Regulation No 492/2011 apply, irrespective of whether or not the care leave allowance at issue in the main proceedings comes within the scope of Regulation No 883/2004.

29 In that regard, it is settled case-law that 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, the

accuracy of which is not a matter for the Court to determine, enjoy a presumption of relevance. The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of EU law that is sought bears no relation to the actual facts of the main action or its object, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (judgment of 7 December 2023, *Obshtina Razgrad*, C-441/22 and C-443/22, EU:C:2023:970, paragraph 44 and the case-law cited).

30 In the present case, it is apparent from the request for a preliminary ruling that the referring court considers that the answer which the Court will give to those questions is relevant to the outcome of the main proceedings, in particular in order to classify the care leave allowance at issue in the light of EU law. It cannot therefore be concluded that the interpretation of EU law sought by the referring court is clearly unnecessary for that court in order to resolve the dispute before it.

31 Consequently, the first to fourth questions are admissible.

Substance

32 As a preliminary point, it should be emphasised that the distinction between benefits falling within the scope of Regulation No 883/2004 and those which are outside it is based essentially on the constituent elements of each benefit, in particular its purpose and the conditions for its grant, and not on whether it is classified as a social security benefit by national legislation (judgment of 15 June 2023, *Thermalhotel Fontana*, C-411/22, EU:C:2023:490, paragraph 22 and the case-law cited).

33 The Court of Justice has consistently held that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it relates to one of the risks expressly listed in Article 3(1) of Regulation No 883/2004. These two conditions are cumulative (judgment of 15 June 2023, *Thermalhotel Fontana*, C-411/22, EU:C:2023:490, paragraph 23 and the case-law cited).

34 It should be recalled that the first of the conditions mentioned in the preceding paragraph is satisfied if a benefit is granted in the light of objective criteria which, if they are met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances (judgment of 15 June 2023, *Thermalhotel Fontana*, C-411/22, EU:C:2023:490, paragraph 24 and the case-law cited).

35 In the present case, it appears that that first condition is met, given that the allowance at issue in the main proceedings is granted automatically, in accordance with the last sentence of Paragraph 21c(1) of the BPGG, where the applicant is on care leave, without the ministerial department taking into account that person’s other personal circumstances.

36 As regards the second condition set out in paragraph 33 above, Article 3(1)(a) of Regulation No 883/2004 explicitly refers to ‘sickness benefits’, which are benefits whose essential aim is the patient’s recovery, by securing the care which his or her condition requires, and which thus cover the risk connected to a state of ill health (see, to that effect, judgment of 15 June 2023, *Thermalhotel Fontana*, C-411/22, EU:C:2023:490, paragraph 27 and the case-law cited).

37 In that regard, the Court has held that expenses entailed by the reliance on care on the part of the person in need of care that concern, concurrently or not, the care provided to that person and the

improvement of that person's everyday life, such as, in particular, expenses for assistance by third parties, are treated in the same way as 'sickness benefits', within the meaning of that provision, since the purpose of those expenses is to improve the state of health and the quality of life of persons reliant on care (see, to that effect, judgments of 5 March 1998, *Molenaar*, C-160/96, EU:C:1998:84, paragraphs 23 and 24, and of 25 July 2018, *A (Assistance for a disabled person)*, C-679/16, EU:C:2018:601, paragraphs 43 and 44 and the case-law cited).

38 In the present case, it is true that the grant of the care leave allowance at issue in the main proceedings arises from the caregiver's status as an employee. Nevertheless, first, that grant is subject to the condition that the person in need of care is in receipt of a care allowance of a certain level pursuant to Austrian law.

39 Second, it appears that the care leave allowance at issue in the main proceedings, even if it is granted and paid to the caregiver in order to compensate for the loss of wages he or she suffers during the period of unpaid leave, is also mainly intended, ultimately, to enable the caregiver to provide the care required by the state of health of the person in need of care, with the result that it is for the benefit of, above all, the latter person.

40 In those circumstances, the Court finds that the care leave allowance at issue in the main proceedings comes within the concept of 'sickness benefits', within the meaning of Article 3(1)(a) of Regulation No 883/2004.

41 As regards, next, the question whether that allowance must be classified as a 'cash benefit', within the meaning of that regulation, it must be noted that that allowance consists in a fixed sum of money paid periodically to the caregiver, without taking account of the actual cost of care, seeking to provide compensation for the loss of wages related to the care leave and to alleviate the financial burden arising from that leave.

42 In that regard, it follows from the case-law of the Court that payment of the insurance of a third person to whom a reliant person resorts for assistance at home must itself also be categorised as a cash benefit, in so far as it is ancillary to the provision of care proper, inasmuch as it is designed to facilitate recourse to care (see, to that effect, judgment of 8 July 2004, *Gaumain-Cerri and Barth*, C-502/01 and C-31/02, EU:C:2004:413, paragraph 27).

43 Consequently, the care leave allowance at issue in the main proceedings, which is in particular ancillary to the provision of care proper, must also be classified as a 'cash benefit', within the meaning of Regulation No 883/2004.

44 In the light of the foregoing, the answer to the first to fourth questions is that Article 3(1)(a) of Regulation No 883/2004 must be interpreted as meaning that the concept of 'sickness benefits', within the meaning of that provision, covers a care leave allowance paid to an employee who provides assistance to or cares for a close relative in receipt of a care allowance in another Member State and who is on unpaid leave on that basis. Consequently, such an allowance comes also within the concept of 'cash benefits', within the meaning of that regulation.

The fifth question

45 At the outset, it should be noted that the referring court points in its fifth question to Article 18 TFEU.

46 In that regard, it should be noted that it is for the Court of Justice, in the procedure laid down by Article 267 TFEU providing for cooperation between national courts and the Court of Justice, 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. The Court may also find it necessary to consider provisions of EU law which the national court has not referred to in its questions (judgment of 7 September 2023, *Groenland Poultry*, C-169/22, EU:C:2023:638, paragraph 47 and the case-law cited).

47 As regards Article 18 TFEU, the Court has stated on numerous occasions that that provision applies only to situations governed by EU law for which the FEU Treaty lays down no specific rules of non-discrimination (see, to that effect, judgment of 8 December 2022, *Caisse nationale d'assurance pension*, C-731/21, EU:C:2022:969, paragraph 28 and the case-law cited).

48 The principle of non-discrimination was, however, given concrete expression, in the field of social security, by Article 45 TFEU and Article 4 of Regulation No 883/2004 as well as by Article 7(2) of Regulation No 492/2011 (see, to that effect, judgment of 16 June 2022, *Commission* v *Austria (Indexation of family benefits)*, C-328/20, EU:C:2022:468, paragraph 98).

49 Therefore, in the light of all the factors noted by the referring court, the Court of Justice considers that, by its fifth question, that court asks, in essence, whether Article 45(2) TFEU, Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011 must be interpreted as precluding legislation of a Member State under which the grant of a care leave allowance is subject to the condition that the person in need of care be in receipt of a care allowance of a certain level pursuant to the legislation of that Member State.

50 In that regard, it should be recalled, first, that the purpose of Article 4 of Regulation No 883/2004 is to ensure, in accordance with Article 45 TFEU, equality of treatment in matters of social security, without distinction based on nationality, by abolishing all discrimination in that regard deriving from the national legislation of the Member States. Second, Article 7(2) of Regulation No 492/2011 provides that a worker who is a national of a Member State is to enjoy, in the territory of another Member State, the same social and tax advantages as national workers (see, to that effect, judgment of 16 June 2022, *Commission* v *Austria (Indexation of family benefits)*, C-328/20, EU:C:2022:468, paragraphs 93 and 94 and the case-law cited).

51 The concept of a 'social advantage', extended by Article 7(2) of Regulation No 492/2011 to workers who are nationals of other Member States, comprises all advantages which, whether or not linked to a contract of employment, are generally granted to national workers, primarily because of their objective status as workers or by virtue of the mere fact of their residence in the national territory, and the extension of which to workers who are nationals of other Member States therefore seems suitable to facilitate their mobility within the European Union and, consequently, their integration into the host Member State. The reference made by that provision to 'social advantages' cannot be interpreted restrictively (judgment of 16 June 2022, *Commission* v *Austria (Indexation of family benefits)*, C-328/20, EU:C:2022:468, paragraph 95 and the case-law cited).

52 It is also clear from the Court's case-law that certain benefits are capable of constituting both sickness benefits, within the meaning of Article 3(1)(a) of Regulation No 883/2004, and a social advantage, within the meaning of Article 7(2) of Regulation No 492/2011 (see, to that effect, judgment of 16 June 2022, *Commission* v *Austria (Indexation of family benefits)*, C-328/20, EU:C:2022:468, paragraph 96 and the case-law cited).

53 Accordingly, the fact that the care leave allowance at issue in the main proceedings, as has been noted in paragraph 39 above, is intended to be for the benefit, above all, of the person in need of care has no bearing on its classification as a 'social advantage' within the meaning of Article 7(2) of Regulation No 492/2011, in so far as that allowance is intended to cover the subsistence costs of a worker who does not carry out any professional activity during his or her leave and therefore does not receive any remuneration.

54 That is all the more so since, as stated in paragraph 48 above, Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011 both give concrete expression to the principle of equal treatment in social security matters laid down in Article 45 TFEU. Therefore, those two provisions must, in principle, be interpreted in the same way and in conformity with Article 45 TFEU (judgment of 16 June 2022, *Commission* v *Austria (Indexation of family benefits)*, C-328/20, EU:C:2022:468, paragraph 98).

55 In those circumstances, in accordance with the Court's case-law, a distinction based on residence, which is liable to operate mainly to the detriment of nationals of other Member States, as non-residents are in the majority of cases foreign nationals, constitutes indirect discrimination on the ground of nationality which is permissible only if it is objectively justified (judgment of 16 June 2022, *Commission* v *Austria (Indexation of family benefits)*, C-328/20, EU:C:2022:468, paragraph 99 and the case-law cited).

56 In the present case, the grant of the care leave allowance at issue in the main proceedings is subject, in accordance with Paragraph 21c(1) of the BPGG, read in conjunction with Paragraph 14c(1) of the AVRAG and Paragraph 3a of the BPGG, to the condition that the person in need of care be in receipt of a care allowance of level 3 or higher under Austrian law. That care leave allowance is therefore granted only if the Austrian authorities are competent to pay a care allowance to the person in need of care. Consequently, the direct link with the Member State of the habitual residence of the persons in need of care must be considered to be established.

57 It follows that the fact that the care leave allowance is ancillary to the care allowance, granted under the applicable Austrian legislation, is liable to affect migrant workers, such as the applicant in the main proceedings, whose father resided in another Member State, more than Austrian nationals, whose family, and in particular parents, are generally habitually resident in Austria.

58 It thus appears that the ancillary nature of the care leave allowance gives rise to indirect discrimination on the ground of nationality which is permissible only if it is objectively justified.

59 In that regard, the Court has repeatedly held that, in order to be justified, such indirect discrimination must be appropriate for securing the attainment of a legitimate objective and must not go beyond what is necessary to attain that objective (judgment of 16 June 2022, *Commission* v *Austria (Indexation of family benefits)*, C-328/20, EU:C:2022:468, paragraph 104 and the case-law cited).

60 Although the order for reference does not contain any information relating to the possible justification for the care leave allowance's ancillary nature in respect of the care allowance of level 3 or higher, granted under the applicable Austrian legislation, the Commission nevertheless refers, in its written observations, to the objective of maintaining the financial balance of the national social security scheme.

61 In that regard, it should be noted that the Court has previously held that Regulation No 883/2004 does not establish a common scheme of social security, but allows different national

schemes to exist. Member States retain the power to organise their social security schemes and, in the absence of harmonisation at EU level, it is for each Member State to determine in its legislation, in particular, the conditions for entitlement to social benefits (judgment of 15 September 2022, *Rechtsanwaltskammer Wien*, C-58/21, EU:C:2022:691, paragraph 61 and the case-law cited).

62 In so far as, as the Commission submits in its written observations, the level of reliance on care is capable of indicating the degree of care needed by the person concerned, meaning, as the case may be, that it is impossible for the caregiver to continue his or her professional activity, the objective of limiting the grant of publicly funded benefits to cases of reliance of level 3 or higher appears legitimate.

63 It must be emphasised, however, that such a condition relating to a degree of reliance on care of level 3 or higher may also be satisfied where the care allowance is granted in accordance with the legislation of another Member State. It should be pointed out, in that regard, that Article 5 of Regulation No 883/2004, read in the light of recital 9 thereof, enshrines the case-law principle of equal treatment of benefits, income and facts that the EU legislature sought to include in the text of that regulation in order that that principle might be developed in keeping with the substance and spirit of the Court's rulings (judgment of 12 March 2020, *Caisse d'assurance retraite et de la santé au travail d'Alsace-Moselle*, C-769/18, EU:C:2020:203, paragraph 42 and the case-law cited).

64 That said, it will be for the referring court ultimately to assess, in the light in particular of the considerations set out in paragraphs 61 to 63 above and on the basis of all relevant factors available, whether, having regard to the justifications permitted under EU law, as recalled in paragraph 59 above, in particular as regards the existence of a possible risk of serious harm to the financial balance of the national social security scheme (see, to that effect, judgment of 28 April 1998, *Kohll*, C-158/96, EU:C:1998:171, paragraph 41, and of 15 September 2022, *Rechtsanwaltskammer Wien*, C-58/21, EU:C:2022:691, paragraph 74 and the case-law cited), the care leave allowance's ancillary nature in respect of the care allowance of level 3 or higher, granted under the Austrian legislation, could be justified. The indirect discrimination at issue in the main proceedings, on the ground of nationality, as referred to in paragraph 58 above, can be justified only if it seeks to attain the objective pursued in a consistent and systematic manner (see, to that effect, judgment of 8 December 2022, *Caisse nationale d'assurance pension*, C-731/21, EU:C:2022:969, paragraph 37 and the case-law cited), which it is also for the referring court to verify.

65 In the light of the foregoing considerations, the answer to the fifth question is that Article 45(2) TFEU, Article 4 of Regulation No 883/2004 and Article 7(2) of Regulation No 492/2011 must be interpreted as precluding legislation of a Member State under which the grant of a care leave allowance is subject to the condition that the person in need of care be in receipt of a care allowance of a certain level pursuant to the legislation of that Member State, unless that condition is objectively justified by a legitimate aim relating, in particular, to maintaining the financial balance of the national social security scheme, and is a proportionate means of achieving that aim.

The sixth and seventh questions

66 By its sixth and seventh questions, which it is appropriate to examine together, the referring court asks the Court of Justice, in essence, whether Article 4 of Regulation No 883/2004 must be interpreted as precluding national legislation or case-law that, first, makes the grant of a care leave allowance and that of a family hospice leave allowance subject to different conditions and, second, does not allow an application for care leave to be reclassified as an application for family hospice leave.

67 In that regard, it is apparent from Article 48 TFEU, which provides for a system for coordinating, and not harmonising, the legislation of the Member States, and on the basis of which Regulation No 883/2004 was adopted, that substantive and procedural differences between the social security schemes of each Member State, and hence in the rights of persons who are insured persons there, are unaffected by that provision, as each Member State retains the power to determine in its legislation, in compliance with EU law, the conditions pursuant to which benefits may be granted under a social security scheme (judgment of 25 November 2021, *Finanzamt Österreich (Family benefits for development aid worker)*, C-372/20, EU:C:2021:962, paragraph 70 and the case-law cited).

68 Regulation No 883/2004 does not establish a common scheme of social security, but allows different national schemes to exist and its sole objective is to ensure the coordination of those schemes in order to guarantee that the right to free movement of persons can be exercised effectively. The Member States thus retain the power to organise their own social security schemes (judgment of 25 November 2021, *Finanzamt Österreich (Family benefits for development aid worker)*, C-372/20, EU:C:2021:962, paragraph 71 and the case-law cited).

69 In the present case, it is apparent from the order for reference that, first, the conditions for the grant of a family hospice leave allowance under Paragraph 21c(3) of the BPGG differ from those laid down in Paragraph 21c(1) thereof as regards the grant of the care leave allowance at issue in the main proceedings, since Paragraph 21c(3) of the BPGG does not require that the person in need of care be in receipt of an Austrian care allowance of level 3 or higher, as provided for in Paragraph 21c(1) of the BPGG.

70 Second, in a situation such as that at issue in the main proceedings, the ministerial department does not appear to be called upon, in accordance with the settled case-law of the Verwaltungsgerichtshof (Supreme Administrative Court), to assess the application for a care leave allowance in the spirit of a socially minded application for the benefit of the applicant, even if that applicant satisfies the conditions for entitlement to a more favourable national allowance, namely the family hospice leave allowance under Paragraph 21c(3) of the BPGG.

71 Nevertheless, as the Austrian Government submits in its written observations, the different rules regarding two rights relating to social security benefits, each pursuing different objectives, and the manner of relying on those rights before the competent national authorities are a matter for national law alone.

72 It is thus apparent that the different rules regarding the conditions for the grant of a care leave allowance and a family hospice leave allowance do not give rise to discriminatory effects to the detriment of persons who have exercised their right to freedom of movement.

73 It follows from the foregoing that the answer to the sixth and seventh questions is that Article 4 of Regulation No 883/2004 must be interpreted as not precluding national legislation or case-law that, first, makes the grant of a care leave allowance and that of a family hospice leave allowance subject to different conditions and, second, does not allow an application for care leave to be reclassified as an application for family hospice leave.

Costs

74 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 (Seventh Chamber) hereby rules:

1. **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**

must be interpreted as meaning that the concept of 'sickness benefits', within the meaning of that provision, covers a care leave allowance paid to an employee who provides assistance to or cares for a close relative in receipt of a care allowance in another Member State and who is on unpaid leave on that basis. Consequently, such an allowance comes also within the concept of 'cash benefits', within the meaning of that regulation.

2. **Article 45(2) TFEU, Article 4 of Regulation No 883/2004 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 precluding legislation of a Member State under which the grant of a care leave allowance is subject to the condition that the person in need of care be in receipt of a care allowance of a certain level pursuant to the legislation of that Member State, unless that condition is objectively justified by a legitimate aim relating, in particular, to maintaining the financial balance of the national social security scheme, and is a proportionate means of achieving that aim.

3. **Article 4 of Regulation No 883/2004**

must be interpreted as not precluding national legislation or case-law that, first, makes the grant of a care leave allowance and that of a family hospice leave allowance subject to different conditions and, second, does not allow an application for care leave to be reclassified as an application for family hospice leave.

[Signatures]

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* Language of the case: German.