JUDGMENT OF THE COURT (Second Chamber)

26 November 2009 *

In Case C-363/08,

REFERENCE for a preliminary ruling under Article 234 EC from the Verwaltungsgerichtshof (Austria), made by decision of 25 June 2008, received at the Court on 7 August 2008, in the proceedings

Romana Slanina

v

Unabhängiger Finanzsenat, Außenstelle Wien,

THE COURT (Second Chamber),

composed of J.-C. Bonichot, President of the Fourth Chamber, acting as President of the Second Chamber, C. Toader, C.W.A. Timmermans, K. Schiemann (Rapporteur) and P. Kūris, Judges,

* Language of the case: German.

Advocate General: M. Poiares Maduro,
Registrar: B. Fülöp, Administrator,

having regard to the written procedure and further to the hearing on 2 July 2009,

after considering the observations submitted on behalf of:

— Ms Slanina, by M. Tröthandl, Rechtsanwalt,

— the Unabhängiger Finanzsenat, Außenstelle Wien, by W. Pavlik, acting as Agent,

— the Austrian Government, by C. Pesendorfer and M. Winkler, acting as Agents,

— the Greek Government, by S. Vodina and O. Patsopoulou, acting as Agents,

— the Polish Government, by M. Dowgielewicz, acting as Agent,

— the Commission of the European Communities, by V. Kreuschitz, acting as Agent,

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

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71').

2 The reference was made in the course of proceedings between Ms Slanina, a divorced Austrian national who had transferred her permanent residence to Greece, and the Unabhängiger Finanzsenat, Außenstelle Wien, concerning a demand for repayment of family allowances and tax credits received by Ms Slanina in Austria in respect of her daughter.

Legal context

Community legislation

3 Article 1(f)(i) of Regulation No 1408/71 defines 'member of the family' as:

'… any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided …; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person, this condition shall be considered satisfied if the person in question is mainly dependent on that person …'

4 According to Article 2(1) of Regulation No 1408/71, that regulation applies to:

'… employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States … as well as to the members of their families and their survivors.'

5 Article 13 of Regulation No 1408/71 provides:

‘1. Subject to Article 14c, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State;
…

…’

6 Article 73 of Regulation No 1408/71, headed ‘Employed or self-employed persons the members of whose families reside in a Member State other than the competent State’, reads as follows:

‘An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.’

7 Article 76(1) of Regulation No 1408/71, headed 'Rules of priority in cases of overlapping entitlement to family benefits under the legislation of the competent State and under the legislation of the Member State of residence of the members of the family', provides:

'Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Article 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.'

8 Although amendments were made to Regulation No 1408/71 during the period to which the dispute in the main proceedings relates, they have no effect on the outcome of that dispute.

National legislation

9 Under Paragraph 2(1) of the Law on Compensation for Family Expenses (Familienlastenausgleichsgesetz) of 1967 ('the FLAG'), persons who are permanently or habitually resident in Austria are entitled to family allowances in respect of their children.

10 Paragraph 2(2) of the FLAG provides that the person entitled to receive family allowances is the person whose household the child belongs to. A person to whose household the child does not belong but who is mainly responsible for the cost of maintaining that child is entitled to family allowances where no other person is entitled to receive them under the first sentence of that subparagraph.

11 Paragraph 2(8) of the FLAG states that persons who have their permanent residence both in Austria and abroad are entitled to receive family allowances only if their centre of interests lies in Austria and if the children reside there permanently. That provision states that a person's centre of interests lies in the State with which he or she has the closer personal and economic connections.

12 Paragraph 26(1) of the FLAG provides:

'Any person who has wrongly received family allowances must repay the amounts in question …'

The main proceedings and the questions referred for a preliminary ruling

13 According to the order for reference, Ms Slanina is the mother of a daughter, Nina, born in 1991. When family allowances were first paid to Ms Slanina the conditions for granting them were met.

14 Since summer 1997, Ms Slanina has been living in Greece and Nina has been at school there since autumn that year. Nina's father, Ms Slanina's ex-husband and an Austrian national, lives and is in employment in Austria. The applicant in the main proceedings exercises sole parental authority over her daughter. The child's father is required to pay maintenance but does not do so.

15 From 1 January 1998 to 31 October 2003 Ms Slanina received family allowances and tax credits in Austria in respect of her daughter Nina totalling EUR 10 884.95, that is to say, EUR 7 824.79 in family allowances and EUR 3 060.16 in tax credits. By decision of the Finanzamt (Tax Office) of Mödling (Austria) of 22 October 2003, she was ordered to repay those amounts on the ground that since 1997 she had been living permanently with her daughter in Greece. The Finanzamt considered that one of the conditions for granting family allowances under Paragraph 2(8) of the FLAG, namely the condition relating to the child's centre of interests and permanent residence in Austria, was not met.

16 Until 2001 Ms Slanina was neither in employment nor registered as seeking work in Greece. She lived on contributions from her relations and on her savings. Since 2001 she has been working for a Greek company as a seasonal tourist guide from May until the beginning of October each year.

17 The action brought by Ms Slanina against the decision of the Finanzamt Mödling of 22 October 2003 was dismissed, first by a preliminary decision of that Finanzamt of 9 December 2004 and then by a decision of the Unabhängiger Finanzsenat, Außenstelle Wien (Independent Tax Tribunal, Vienna Office) of 30 June 2005. Ms Slanina therefore brought proceedings in the Verwaltungsgerichtshof (Administrative Court). She claimed in essence that although under Austrian legislation she was not entitled to family allowances, Regulation No 1408/71 should none the less apply. Since Nina's father, her ex-husband, was living and working in Austria, Ms Slanina was entitled to family allowances under Article 73 of that regulation, despite the fact that she was living in Greece.

18 It is in those circumstances that the Verwaltungsgerichtshof decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Does it follow from Regulation No 1408/71 … that the divorced wife, who is not in work, of a man who is resident and employed in Austria, maintains her right to family allowances (in respect of a child) vis-à-vis Austria, if she establishes a

permanent residence in another Member State and transfers her centre of interests there, and if she continues not to be in work there?

2. Is it relevant to the answer to question 1 that Austria, where the divorced husband remains and where he is exclusively resident and employed, grants him under certain conditions the right to family allowances (in respect of the child), if the divorced wife's right no longer exists?

3. Does Regulation No 1408/71 give the divorced wife a right to family allowances (in respect of the child) vis-à-vis Austria, where the divorced husband and father of the child is resident and employed, if the circumstances as described in question 1 change in that the wife takes up employment in the new Member State?'

The questions referred

First and second questions

19 By its first and second questions, which it is appropriate to examine together, the referring court asks essentially whether Article 73 of Regulation No 1408/71 must be interpreted as meaning that a divorced person who was paid family allowances by the competent institution of the Member State in which she was living and where her ex-husband continues to live and work maintains her entitlement to those allowances even though she leaves that State and settles with her child in another Member State, where

she does not work, and even though her ex-husband, the father of the child, could receive those allowances in his State of residence.

20 According to the documents before the Court, Ms Slanina is the ex-wife of an employee who during the period relevant to the dispute in the main proceedings was subject, under Article 13(1) and (2) of Regulation No 1408/71, to the legislation of the Republic of Austria, the Member State in which he worked.

21 Article 73 of Regulation No 1408/71 provides that an employed or self-employed person subject to the legislation of a Member State is entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State.

22 The purpose of Article 73 is to guarantee members of the family of a worker subject to the legislation of a Member State who are residing in another Member State the grant of the family benefits provided for by the applicable legislation of the former State (see Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 32, and Case C-255/99 *Humer* [2002] ECR I-1205, paragraph 39).

23 Even though the referring court has not put a question to the Court in that regard, it should be pointed out that the entitlement to family allowances in respect of a child under Article 73 of Regulation No 1408/71, paid either to Ms Slanina or to her ex-husband, was in fact conditional upon the child coming within the personal scope of Regulation No 1408/71. That scope is defined in Article 2 of that regulation. Thus, under Article 2(1), that regulation applies in particular to 'employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States … as well as to the members of their families …'.

24 The term 'member of the family' is defined in Article 1(f)(i) of Regulation No 1408/71 as 'any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided …; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person, this condition shall be considered satisfied if the person in question is mainly dependent on that person. …'

25 Thus, first of all, that provision makes express reference to national legislation, defining a 'member of the family' as 'any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided …', that is to say, in the case in the main proceedings, by the FLAG.

26 Secondly, Article 1(f)(i) of Regulation No 1408/71 introduces the proviso 'where, however, the said [national] legislations regard as a member of the family or a member of the household only a person living under the same roof as the employed or self-employed person, this condition shall be considered satisfied if the person in question is mainly dependent on that person. …'

27 Accordingly, it is for the referring court to establish whether the condition laid down in Article 1(f)(i) of Regulation No 1408/71 is met in the present case, that is to say, whether the child, although not having lived with her father during the period at issue in the main proceedings, could be regarded for the purposes of national law as a 'member of the family' of her father and, if that is not the case, whether she could be regarded as being 'mainly dependent on' him.

28 It is apparent from the documents before the Court that Ms Slanina's ex-husband was indeed required to pay maintenance in respect of his daughter Nina. The fact that he has

not paid it is irrelevant as regards the issue of whether the child is a member of his family.

29 If the findings made by the referring court were to lead it to conclude that the situation at issue in the main proceedings came within the personal scope of Regulation No 1408/71, the question would arise whether a person in Ms Slanina's situation may rely on Article 73 of that regulation. The national court also asks whether the fact that the divorced husband remained in Austria, where he works and would be entitled to the benefits at issue in the main proceedings under national law, can affect the right of a person in Ms Slanina's situation to retain those benefits.

30 In that regard, it should be noted that the fact that Ms Slanina and her ex-husband are divorced is irrelevant. The Court has already held that although Regulation No 1408/71 does not expressly cover family situations following a divorce there is nothing to justify the exclusion of such situations from the scope of Regulation No 1408/71. One of the normal consequences of a divorce is that custody of the children is granted to one of the parents, with whom those children will reside. It is possible, for a variety of reasons (in this case as the result of a divorce), that the parent with custody of a child will leave his or her Member State of origin and settle in another Member State in order to work there, as in *Humer*, or, as in the case in the main proceedings here, to take up employment there only some years after establishing his or her residence there. In such a case, the residence of the minor child will also be transferred to that other Member State (see *Humer*, paragraphs 42 and 43).

31 It should be observed that family benefits by their nature cannot be regarded as payable to an individual in isolation from his or her family circumstances. It is therefore irrelevant that the person to whom the family benefits are to be awarded is Ms Slanina rather than the worker himself, namely, Ms Slanina's ex-husband (see *Humer*, paragraph 50).

32 In the light of the foregoing, the answer to the first and second questions is that Article 73 of Regulation No 1408/71 must be interpreted as meaning that a divorced person who was paid family allowances by the competent institution of the Member State in which she was living and where her ex-husband continues to live and work maintains in respect of her child, provided that child is recognised as a 'member of the family' of the ex-husband within the meaning of Article 1(f)(i) of that regulation, entitlement to such allowances even though she leaves that State and settles with her child in another Member State, where she does not work, and even though her ex-husband could receive those allowances in his Member State of residence.

Third question

33 By its third question, the referring court asks essentially whether the fact that Ms Slanina took up employment in Greece affected her entitlement to family allowances in Austria.

34 If it were to be established that engaging in such employment gave rise in Greece to entitlement to family allowances equivalent to those paid in Austria, the answer to that question would be yes.

35 It is apparent from the observations of the Greek Government and the Commission that Greek law provides for the payment of family allowances only to certain employed persons. Such payment is therefore always connected to an employment relationship, and residence in Greece by itself is not sufficient. It is for the referring court to

determine whether the fact that Ms Slanina was in employment in the Hellenic Republic gave her an entitlement to family allowances in that Member State.

36 If it emerged that such was the case, it would be necessary to apply the rule against 'overlapping' in Article 76 of Regulation No 1408/71. That provision is intended to resolve cases where entitlement to family benefits under Article 73 of that regulation overlaps with entitlement to family benefits under the national legislation of the family members' State of residence by reason of the carrying on of an occupation (see Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-5049, paragraph 53).

37 Under Article 76 of Regulation No 1408/71, the obligation to pay family benefits would in that case have fallen first of all on the Hellenic Republic as the Member State in which Nina and her mother are resident. Entitlement to Austrian family benefits, under Article 73 of that regulation, would have been suspended up to the sum provided for by Greek legislation.

38 In the light of the foregoing, the answer to the third question is that the fact that a person in a situation such as that of the applicant in the main proceedings is in employment in her Member State of residence, giving entitlement to family allowances, has, under Article 76 of Regulation No 1408/71, the effect of suspending entitlement to family allowances payable under the legislation of the Member State in whose territory her ex-husband is in employment, up to the sum provided for by the legislation of her Member State of residence.

Costs

39 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 (Second Chamber) hereby rules:

1. **Article 73 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, must be interpreted as meaning that a divorced person who was paid family allowances by the competent institution of the Member State in which she was living and where her ex-husband continues to live and work maintains in respect of her child, provided that child is recognised as a 'member of the family' of the ex-husband within the meaning of Article 1(f)(i) of that regulation, entitlement to such allowances even though she leaves that State and settles with her child in another Member State, where she does not work, and even though her ex-husband could receive those allowances in his Member State of residence.**

2. **The fact that a person in a situation such as that of the applicant in the main proceedings is in employment in her Member State of residence, giving entitlement to family allowances, has, under Article 76 of Regulation No 1408/71, in the version amended and updated by Regulation No 118/97,**

the effect of suspending entitlement to family allowances payable under the legislation of the Member State in whose territory her ex-husband is in employment, up to the sum provided for by the legislation of her Member State of residence.

[Signatures]