OPINION OF ADVOCATE GENERAL ELMER

delivered on 8 June 1995 *

1. The German Sozialgericht Nürnberg (Social Court, Nuremberg) has referred to the Court for a preliminary ruling two questions concerning the application of Article 73 of Regulation (EEC) No 1408/71 of the Council [1] in conjunction with the German legislation on family allowances and the German tax rules on the tax allowance for dependent children and joint taxation for married couples.

Facts

2. The plaintiff in the main proceedings, the Spanish national José Imbernon Martínez, lived in Spain until September 1988. On 18 September 1988 he travelled to the Federal Republic of Germany and from 21 September 1988 was employed by the German Schafft Fleischwerke GbmH in Ansbach.

Mr Imbernon Martínez's Spanish wife and their two children, born in 1974 and 1978, remained resident in Spain, where as far as is known the wife had neither employment nor other income.

Mr Imbernon Martínez received in Spain from 1 January 1988 until 30 August 1988 unemployment benefit of PTA 33 030, corresponding to DM 4 000.59, whilst for the remainder of 1988 he received from his employment in Germany an income of DM 9 923.

The German Bundesanstalt für Arbeit, Kindergeldkasse, provided Mr Imbernon Martínez from September 1988 with full family allowance for his two children. The German tax authorities also took into account in the annual statement of income for 1988 a tax allowance for the two children. The tax allowance was granted under § 33a of the German income tax Law, the Einkommensteuergesetz (hereinafter referred to as 'the EStG') according to which in special cases an allowance may be granted in the annual statement for *inter alia* persons who would

* Original language: Danish.

1 — OJ, English Special Edition 1971 (II), p. 416, in the version of Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6) as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1) and most recently by Council Regulation (EEC) No 1249/92 of 30 April 1992 (OJ 1992 L 136, p. 28).

otherwise have no right to an allowance for children in the income subject to tax. The allowance granted was reduced as against the general child allowance as it was calculated *pro rata temporis* and thus covered only the months of 1988 during which Mr Imbernon Martínez had resided in Germany.

On 26 March 1990 Mr Imbernon Martínez applied under § 11a(1) of the German Law on family allowances, the Bundeskindergeldgesetz (hereinafter referred to as 'the BKGG' for a supplementary family allowance for his children amounting to DM 91 per month. On 29 May 1990 he was granted a supplementary amount of DM 11 per month for the period in question but the application for a family allowance supplement under BKGG § 11a(1) was by implication refused.

By a letter of 6 June 1990 Mr Imbernon Martínez complained against that decision claiming that, on the basis of the notional residence provided for by Article 73 of Regulation No 1408/71, he should be treated as if his wife and children were residing in Germany. That would result in his having a right to child allowance in his taxable income and to a tax assessment according to the rules of joint taxation for married couples ('splitting') and thus also a claim for the general family allowance supplement under BKGG § 11a(1).

The objection was rejected by decision of 23 August 1990, whereupon Mr Imbernon Martínez brought an action before the Sozialgericht Nürnberg.

The reference for a preliminary ruling

3. The Sozialgericht Nürnberg stayed the proceedings by order of 26 April 1993 and referred the following questions to the Court of Justice for a preliminary ruling:

(1) Does the rule of notional residence, contained in Article 73 of Regulation (EEC) No 1408/71 of the Council, mean that persons entitled to family allowance whose children reside in another Member State of the European Community must be treated, for the purposes of § 11a of the Bundeskindergeldgesetz (Law on Family Allowances) and the tax provisions referred to therein, as if their children were resident within the territory covered by the Bundeskindergeldgesetz?

(2) (a) Does the rule of notional residence, contained in Article 73 of Regulation (EEC) No 1408/71 of the Council, mean that persons entitled to family allowance whose spouses reside in another Member State of the European Community must be treated,

for the purposes of § 11a of the Bundeskindergeldgesetz and the tax provisions referred to therein, as if their spouses were resident within the territory covered by the Bundeskindergeldgesetz?

(2) (b) If Question (2) (a) is answered in the affirmative, must the plaintiff be treated as if the rate of income tax had been calculated in accordance with § 32a(5) of the Einkommensteuergesetz (Income Tax Law)?

The German legislation

4. Under the first sentence of § 1(1) of the EStG, only persons who have their residence or usual abode in Germany are fully liable to income tax.

Under EStG § 2(7) income tax is normally an annual tax. However, in so far as the tax liability does not cover the whole calendar year, the period during which the person concerned is taxable in Germany is substituted for the calendar year.

According to EStG § 26(1) married couples who are both fully taxable in Germany may choose to be taxed separately or jointly (so-called 'splitting'). If they choose to be taxed jointly § 26b provides that their incomes are aggregated, whereupon their total income is taxed as if each of them had received half. If one spouse has a high income and the other a low income or none, the application of 'splitting' means that the couple's taxable income is equalized so that the progressive nature of the income tax scale is alleviated.

5. With regard to the allowance for dependent children EStG § 32(2) provided at the material time that expenditure for a child could be taken into account only if the child was fully assessable to tax in Germany.

§ 32(6) further provided that:

'A tax allowance for a dependent child of DM 2 052 shall be deducted from the income for each of the taxpayer's children to be taken into account. For married couples jointly assessed under §§ 26 and 26b the said allowance to be deducted shall be DM 4 104 if the child is the child of both spouses ...'

6. In the BKGG it is provided in § 11a(1) that:

'The family allowance for the children in respect of whom the person concerned is entitled to the dependent child allowance under § 32(6) of the Income Tax Law shall be increased by the supplement assessed under subparagraph 6 if the taxable income ... of the person concerned is less than the basic tax-free allowance ... The taxable income shall be taken into account in so far as and in the manner in which it was made the basis of taxation; where relevant the taxable income shall be determined as a negative amount. If the scale of income tax has been calculated according to § 32a(5) or (6) of the Income Tax Law the basic tax-free allowance shall be replaced by double that amount.'

The relevant provisions of Community law

7. The parties to the dispute have claimed that Article 48 of the EEC Treaty is relevant for the solution to this action. It provides:

'1. Freedom of movement for workers shall be secured within the Community by the end of the transitional period at the latest. [2]

2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:

2 — According to Article 8 of the EEC Treaty, which was signed on 25 March 1957, the common market was to be progressively established during a transitional period of twelve years.

(a) to accept offers of employment actually made;

(b) to move freely within the territory of Member States for this purpose;

(c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;

(d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.

4. ...'

8. Regulation No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community prescribes in Article 73 that:

'A worker subject to the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State.'

Observations of the parties submitted to the Court

9. Mr Imbernon Martínez has claimed that it follows from the wording of Article 73 of Regulation No 1408/71 and from the principles laid down in Articles 48 to 51 of the Treaty, that a worker's right to receive a family benefit under the legislation of a Member State applicable to that worker must not depend on whether members of his family reside in the territory of that Member State. The fact that a Member State's legislation on family benefits refers to tax provisions according to which the members of the worker's family must reside within the territory of the Member State in order that the worker may acquire the right to family benefits cannot have the effect that Article 73 of Regulation No 1408/71 regarding the so-called 'notional residence' is inapplicable, since otherwise every Member State, by referring in its social legislation to other provisions of law, could free itself from the rule in Article 73.

Mr Imbernon Martínez has further stated that he has suffered discrimination in a

manner corresponding to the situation in the *Schumacker* case. [3]

10. The Spanish Government has stated that the contested supplement to the family allowance constitutes a family benefit within the meaning of Article 73 of Regulation No 1408/71. The Federal Republic of Germany is certainly entitled to lay down its own rules for social benefits, but in doing so it must ensure that their content corresponds to the requirements of the harmonization provisions issued by the Community. The Federal Republic must therefore above all have regard to the principle of the prohibition of discrimination against workers and their families on grounds of nationality or residence, as prescribed in Articles 7 and 48 of the EEC Treaty and Article 3 of Regulation No 1408/71.

In the Spanish Government's view it is therefore impossible to require, as does BKGG § 11a(1), that the supplement to the family allowance be made dependent upon the children's having their residence in Germany, since that would call in question the right of the worker's family to have their residence in another Member State and would affect freedom of movement for workers within the Community. The rule in Article 73 of Regulation No 1408/71 must therefore apply both to BKGG § 11a(1) and to the tax provisions to which it refers.

11. The Commission's view is that consideration should first be given to the question whether the German tax provisions, the requirements of which must be met for the acquisition of a right to the family allowance supplement, are compatible with the rules in Article 48 of the Treaty and with Article 7 of Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community. [4] Direct taxes are not excluded from the prohibition of discrimination in the Treaty, and if the German tax rules make certain concessions dependent on the place of residence of a worker's family, that legislation and with it also the provision on the family allowance supplement, which refers thereto, will be particularly prejudicial to taxable workers who are nationals of another Member State. That amounts to covert discrimination which conflicts with Article 48 of the Treaty and Article 7 of Regulation No 1612/68.

In case the Court does not agree, the Commission has claimed that the family allowance supplement under BKGG § 11a(1) is a family benefit and therefore falls within the rules of Article 73 of Regulation No 1408/71.

3 — Judgment in Case C-279/93 [1995] ECR I-225.

4 — OJ, English Special Edition 1968 (II), p. 475.

12. The German Government has stated during the oral procedure that EStG § 32(2) has now been repealed in pursuance of the Gesetz zur Bekämpfung des Mißbrauchs und zur Bereinigung des Steuerrechts of 21 December 1993 and that in pursuance of the same Law § 32(6) has been inserted in the EStG to provide that:

'For a child which was not at the beginning of the calendar year fully assessable to tax and has not during the course of the calendar year become fully assessable, a dependent child allowance shall be withheld only to the extent necessary and appropriate according to the circumstances in the State in which the child resides.'

The German Government's view is that in future, for children living in a Member State it will practically always be regarded as necessary and reasonable to deduct from the taxable income an amount for expenditure in respect of children. Thus in the case of taxation of workers from Member States there will, in the government's opinion, in practice no longer be any distinction as to whether the worker's children reside in Germany or in another Member State.

As far as the main proceedings are concerned, the German Government has stated that the Federal Minister for Finance provided by letter of 10 August 1992 that in the case of expenditure in respect of the taxpayer's own children there should no longer be any reduction of the extraordinary supplement according to EStG § 33a, as from the calendar year 1992, and for previous calendar years in so far as the tax assessment relating thereto had not yet become definitive. On those grounds the German authorities had therefore, by administrative action, granted Mr Imbernon Martínez the family allowance supplement claimed.

Finally the German Government has stated that as a result of the Court's judgment in the *Schumacker* case workers from other Member States will in future be treated as if their spouse lived in Germany.

The German Government further takes the view that the Court's judgment in the *Schumacker* case must be correspondingly applied in this case.

Admissibility

13. Irrespective of the fact that the German authorities have retroactively granted Mr Imbernon Martínez the family allowance supplement claimed, the Sozialgericht Nürnberg has maintained its request for an answer to the questions raised, stating

that Mr Imbernon Martínez has an interest in having the questions answered as at some later time — for example as a result of unemployment — he might again be placed in a situation in which he receives such a low income that he comes within the scope of BKGG § 11a(1).

14. The Court has previously held that:

'It is ... solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of each case ... the need for a preliminary ruling in order to enable it to deliver judgment ...' [5]

According to the case-law of the Court a reference for a preliminary ruling does not lose all connection with the substance of the main proceedings merely because the dispute which has led to the reference seems not — or no longer — to exist on the basis of the reference to the Court of Justice. [6] For the question of whether the Court of Justice must give a decision in the matter, no significance can therefore be attached to the fact that the German authorities have paid the benefit requested.

It can also hardly be of significance that the German Government will in corresponding cases in future ensure that the German provisions on taxation are interpreted in such a way that workers from other Member States are treated as if their spouses and children resided in Germany so that similar disputes could not therefore arise. Article 177 of the Treaty, which implies collaboration and a clear allocation of tasks between the national courts and the Court of Justice, does not give the Court jurisdiction to check the grounds for references or the relevance of the questions referred to it. [7]

Finally it does not appear either from the letter from the court of reference maintaining its request for a preliminary ruling with regard to the question raised or from the observations submitted to the Court that the proceedings on which the reference for a preliminary ruling is based are no longer pending. The questions raised cannot therefore be declared inadmissible on the ground that a preliminary ruling will not be taken into account. [8]

15. For these reasons I do not consider that the Court should refuse to give a decision in this case.

5 — See most recently the judgment in Case C-30/93 *AC-ATEL Electronics Vertriebs* [1994] ECR I-2305 at paragraph 18.

6 — See for example the judgments in Case 86/78 *Peureux* [1979] ECR 897 at paragraph 6 and in Case C-3/90 *Bernini* [1992] ECR I-1071 at paragraph 10.

7 — See the judgment in Case C-297/89 *Ryborg* [1991] ECR I-1943 at paragraph 9 and the corresponding judgments in Case 111/75 *Mazzalai* [1976] ECR 657 at paragraph 9 and in Case C-83/91 *Meilicke* [1992] ECR I-4871 at paragraph 24.

8 — See the judgments in Case C-159/90 *Grogan* [1991] ECR 4685 I-4685 at paragraph 12, in Case 338/85 *Pardini* [1988] ECR 2041 at paragraph 11 and in Case C-343/90 *Lourenço Dias* [1992] ECR I-4673 at paragraph 18.

Substance

16. The proceedings pending before the national court concern the question of the right to receive a family allowance supplement under the legislation previously in force, that is, before the amendments to the tax rules referred to by the German Government. I shall therefore refer only to the state of the law at that time.

17. The court of reference has referred to the Court of Justice only questions concerning the German rules on family allowances and the German tax provisions regarding the tax-free allowance for children and the joint assessment of married couples in relation to Article 73 of Regulation No 1408/71.

However, I agree with the Commission that it is necessary first to consider whether Article 48 of the Treaty on freedom of movement for workers within the Community precludes national rules like the German provisions. Those rules, by a reference to a series of national tax provisions, make the right to a family benefit for a worker who is a national of a Member State and who, in connection with employment, has taken up residence in another Member State, dependent upon the worker's spouse and children also taking up residence or having their usual abode in the same Member State as the worker.

If rules on such treatment of workers from other Member States cannot be regarded as compatible with Article 48 of the Treaty, there will be no reason for considering the specific questions regarding notional residence under Article 73 of Regulation No 1408/71.

18. Even though the Court of Justice has no jurisdiction in the context of Article 177 to give a decision as to the compatibility of national measures with the Treaty, the Court has nevertheless consistently held that it is competent to provide the national court with all material relating to the interpretation of Community law which may enable it to reach a decision on that matter. [9]

19. In the *Schumacker* case, previously cited, the Court considered a number of questions referred to it for a preliminary ruling as to whether national provisions, under which taxable persons were treated differently

9 — See for example the judgments in Case C-438/92 *Rustica Semences* [1994] ECR I-3519, in Case C-131/91 *'K' Line Air Service Europe* [1992] ECR I-4513 and in Case 215/87 *Schumacher* [1989] ECR 617.

according to whether they were resident in the Member State in question, might be regarded as compatible with Article 48 of the Treaty.

The situation in that case was that the Belgian national Roland Schumacker lived in Belgium but was in paid employment in the Federal Republic of Germany. His wife also lived in Belgium where, however, she had no income. In these circumstances Mr Schumacker requested the German tax authorities to calculate the taxes deducted at source from his earnings in accordance *inter alia* with the 'splitting' system, but the request was refused on the ground that his wife did not reside in Germany.

In its judgment the Court of Justice first considered the question of whether the prohibition of discrimination in Article 48 of the Treaty was applicable also to national provisions of tax law and declared that:

'Article 48 of the Treaty must be interpreted as being capable of limiting the right of a Member State to lay down conditions concerning the liability to taxation of a national of another Member State and the manner in which tax is to be levied on the income received by him within its territory, since that article does not allow a Member State, as regards the collection of direct taxes, to treat a national of another Member State employed in the territory of the first State in the exercise of his right of freedom of movement less favourably than one of its own nationals in the same situation' (paragraph 24).

The Court then considered when discrimination existed and declared that:

'The Court has consistently held that the rules regarding equal treatment forbid not only overt discrimination by reason of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result' (paragraph 26),

and that:

'It is ... settled law that discrimination can arise only through the application of different rules to comparable situations or the application of the same rule to different situations' (paragraph 30).

With regard to the question whether there was discrimination in a situation such as that described, the Court replied:

'In the case of a non-resident who receives the major part of his income and almost all his family income in a Member State other than that of his residence, discrimination

arises from the fact that his personal and family circumstances are taken into account neither in the State of residence nor in the State of employment' (paragraph 38).

The Court did not find that that discriminatory treatment could be justified with a view to ensuring the cohesion of the applicable tax system:

'In a situation such as that in the main proceedings, the State of residence cannot take account of the taxpayer's personal and family circumstances because the tax payable there is insufficient to enable it to do so. Where that is the case, the Community principle of equal treatment requires that, in the State of employment, the personal and family circumstances of a foreign non-resident be taken into account in the same way as those of resident nationals and that the same tax benefits should be granted to him' (paragraph 41).

The Court further took the view that the discriminatory treatment could not be justified by administrative difficulties on the part of the State of employment in obtaining information with regard to the income which a non-resident was receiving in his State of residence:

'Council Directive 77/799/EEC ... concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation ... provides for ways of obtaining information comparable to those existing between tax authorities at national level' (paragraph 45).

On those grounds the Court decided:

'Article 48 of the Treaty must be interpreted as precluding the application of rules of a Member State under which a worker who is a national of, and resides in, another Member State and is employed in the first State is taxed more heavily than a worker who resides in the first State and performs the same work there when, as in the main action, the national of the second State obtains his income entirely or almost exclusively from the work performed in the first State and does not receive in the second State sufficient income to be subject to taxation there in a manner enabling his personal and family circumstances to be taken into account.'

20. It may be helpful to compare the specific circumstances in the *Schumacker* case with those in this case. Roland Schumacker resided in Belgium and was in paid employment from 15 May 1988 until 31 December 1989 in Germany. As a result of a double taxation agreement between Belgium and Germany the right to impose taxation devolved upon Germany as the State in which the work was performed. After 15 May 1988 Roland Schumacker had no income in Belgium. There is no information in the judgment as to his income situation prior to 15 May 1988.

From 1 January 1988 until 30 August 1988 Mr Imbernon Martínez lived in Spain, where he received not quite one third of his income for 1988. From 1 September 1988 and for the rest of the year he was in paid employment in Germany, where he received more than two thirds of his total income for 1988. In that period he was fully taxable in Germany and from 1 September 1988 he had no income in Spain.

The tax situation was the same for Schumacker and Martínez, since during the periods at issue they both received their total income from work in Germany and during that time neither of them had in another State income sufficient to be taxed in such a way that account was taken of their family circumstances.

Accordingly the only difference between the two cases is that Mr Imbernon Martínez resided in Germany during the relevant period and thus had an even closer link with that country than Roland Schumacker.

On those grounds I think it must be concluded that in this situation too as a result of the German tax rules on the tax allowance for dependent children and the taxation of spouses different rules were applied to comparable situations since as regards Mr Imbernon Martínez no consideration was given to his personal situation as regards the grant of family allowances either in the State of employment or in the State of which he was a national, whilst such consideration was given in the case of German nationals pursuing comparable paid employment and living with the members of their family in Germany.

21. As stated by the Court in the *Schumacker* case, such unequal treatment cannot be justified either by the need to ensure cohesion of the applicable tax system or by the administrative difficulties which the German tax authorities might have in ascertaining the worker's taxable income.

22. I shall therefore recommend the Court to reply to the court of reference to the effect that Article 48 must be interpreted as meaning that it precludes national provisions

according to which the right to a family benefit for workers who are nationals of one Member State but have their paid employment and residence in another Member State is dependent upon certain conditions of tax law which can be met only if the worker's spouse and children have their residence or usual abode in the same Member State as the worker.

23. There is therefore no need to consider whether Article 73 of Regulation No 1408/71 is applicable in relation to the rules contained in BKGG § 11a(1).

Conclusion

24. I shall accordingly propose that the Court should give judgment as follows:

— Article 48 of the EEC Treaty precludes national provisions according to which the right to a family benefit for workers who are nationals of one Member State but have their paid employment and residence in another Member State is dependent upon certain conditions of tax law which can be met only if the worker's spouse and children have their residence or usual abode in the same Member State as the worker.