JUDGMENT OF THE COURT (Eighth Chamber)

18 November 2010 *

In Case C-247/09,

REFERENCE for a preliminary ruling under Article 234 EC from the Finanzgericht Baden-Württemberg (Germany), made by decision of 18 June 2009, received at the Court on 7 July 2009, in the proceedings

Alketa Xhymshiti

v

Bundesagentur für Arbeit — Familienkasse Lörrach,

* Language of the case: German.

THE COURT (Eighth Chamber),

composed of K. Schiemann (Rapporteur), President of the Chamber, L. Bay Larsen and C. Toader, Judges,

Advocate General: J. Mazák,
Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— the German Government, by M. Lumma and J. Möller, acting as Agents,

— 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 Council Regulation (EEC) No 1408/71 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), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 (OJ 2006 L 392, p. 1) ('Regulation No 1408/71'), Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, in the version amended and updated by Regulation No 118/97 ('Regulation No 574/72'), Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation No 1408/71 and Regulation No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality (OJ 2003 L 124, p. 1), and also the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed at Luxembourg on 21 June 1999 (OJ 2002 L 114, p. 6) ('the EU-Switzerland Agreement').

2 The reference has been made in the context of proceedings between Mrs Xhymshiti, an Albanian national legally resident in Germany and the spouse of a Kosovan national legally resident in Germany and working in Switzerland, and the Bundesagentur für Arbeit — Familienkasse Lörrach (Federal Employment Agency — Family Allowances Office, Lörrach) ('the FKL') concerning the refusal by the latter to grant, by way of child allowance, an amount corresponding to the difference between Swiss child

allowance and German child allowance in respect of her two children, who are German nationals.

Legal context

Community legislation

3 Regulations No 1408/71 and No 574/72 seek to permit the transfer of social benefits between the Member States in order to facilitate the free movement of persons.

4 Paragraph (1) of Article 2 of Regulation No 1408/71, entitled 'Persons covered', provides:

'This Regulation shall apply to employed or self-employed persons and to students 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 or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

5 Under Article 13 of that regulation, entitled 'General rules':

'1. Subject to Articles 14c and 14f, 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 or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...'

6 Paragraph (1) of Article 76 of Regulation No 1408/71, entitled '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 as follows:

'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.'

7 Paragraph (1) of Article 10 of Regulation No 574/72, entitled 'Rules applicable in the case of overlapping of rights to family benefits or family allowances for employed or self-employed persons', provides:

'1. (a) Entitlement to benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment, shall be suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another Member State or in application of Articles 73, 74, 77 or 78 of the Regulation, up to the sum of those benefits.

(b) However, where a professional or trade activity is carried out in the territory of the first Member State:

(i) in the case of benefits due either only under national legislation of another Member State or under Articles 73 or 74 of the Regulation to the person entitled to family benefits or to the person to whom they are to be paid, the right to family benefits due either only under national legislation of that other Member State or under those articles shall be suspended up to the sum of family benefits provided for by the legislation of the Member State in whose territory the member of the family is residing. The cost

of the benefits paid by the Member State in whose territory the member of the family is residing shall be borne by that Member State;

(ii) in the case of benefits due either only under national legislation of another Member State or under Articles 77 or 78 of the Regulation, to the person entitled to these benefits or to the person to whom they are payable, the right to these family benefits or family allowances due either only under the national legislation of that other Member State or in application of those articles shall be suspended; where this is the case, the person concerned shall be entitled to the family benefits or family allowances of the Member State in whose territory the children reside, the cost to be borne by that Member State, and, where appropriate, to benefits other than the family allowances referred to in Article 77 or Article 78 of the Regulation, the cost to be borne by the competent State as defined by those articles.'

8 Regulation No 859/2003 is designed to extend the rights granted to citizens of the European Union by Regulations No 1408/71 and No 574/72 to nationals of non-member countries.

9 Recitals 9, 11, 12, 15 and 16 in the preamble to that regulation state:

'(9) Hence, it is necessary to provide for the application of the coordination rules of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to third-country nationals legally resident in the Community who are not currently covered by the provisions of these Regulations on grounds of their nationality and who satisfy the other conditions provided for in this Regulation; such an extension is in

particular important with a view to the forthcoming enlargement of the European Union.

…

(11) The provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 are, by virtue of this Regulation, applicable only in so far as the person concerned is already legally resident in the territory of a Member State. Being legally resident is therefore a prerequisite for the application of these provisions.

(12) The provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 are not applicable in a situation which is confined in all respects within a single Member State. This concerns, inter alia, the situation of a third-country national who has links only with a third country and a single Member State.

…

(15) To achieve these objectives it is necessary and appropriate to extend the scope of the rules coordinating the national social security schemes by adopting a Community legal instrument which is binding and directly applicable in every Member State which takes part in the adoption of this Regulation.

(16) This Regulation is without prejudice to rights and obligations arising from international agreements with third countries to which the Community is a party and which afford advantages in terms of social security.'

10 Article 1 of Regulation No 859/2003 provides:

'Subject to the provisions of the Annex to this Regulation, the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 shall apply to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality, as well as to members of their families and to their survivors, provided they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.'

11 The Annex to Regulation No 859/2003, relating to specific provisions referred to in Article 1 of that regulation, provides that, for Germany, '[i]n the case of family benefits, this Regulation shall apply only to third-country nationals who are in possession of a residence permit meeting the definition in German law of the "Aufenthaltserlaubnis" or "Aufenthaltsberechtigung".'

12 The EU-Switzerland Agreement provides, in Article 1 of Annex II thereto, in relation to the coordination of social security schemes:

'1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the Community acts to which reference is made,

as in force at the date of signature of the Agreement and as amended by section A of this Annex, or rules equivalent to such acts.

2. The term "Member State(s)" contained in the acts referred to in section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant Community acts.'

13 Section A of that annex refers to both Regulation No 1408/71 and Regulation No 574/72.

National legislation

14 Paragraph 62(1) of the Einkommensteuergesetz (German federal Law on income tax) ('the EStG') provides:

'The following persons shall be entitled to child allowance in respect of children within the meaning of Paragraph 63 of the present Law:

1. those having their permanent or normal place of residence within the national territory ...'

15 Subparagraph (1) of Paragraph 65 of the EStG, entitled 'Other child benefits', provides:

'Child allowance shall not be paid for a child who is in receipt of one of the following benefits or who would receive such a benefit if an application to that effect were made:

…

2. child benefits granted outside Germany and comparable to child allowance or to one of the benefits referred to in point 1;

….'

16 The referring court explains that entitlement to German child allowance is not subject to the condition that an economic activity is carried on in Germany.

17 The referring court further explains that Swiss child allowance is comparable to German child allowance.

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

18 Mr and Mrs Xhymshiti live in Germany with their two children and are both in possession of the residence permits referred to in the part of the Annex to Regulation No 859/2003 which relates to Germany.

19 Mrs Xhymshiti, an Albanian national, is not employed or self-employed. Mr Xhymshiti, a Kosovan national, works in Switzerland, where he pays contributions to old-age insurance and survivors' insurance. He receives child allowance for his children, both of whom are German nationals, from his Swiss employer.

20 From the time when their first child, Albion, was born on 28 April 2005, Mrs Xhymshiti received a so-called 'top-up' child allowance from the German State, corresponding to the difference between German child allowance and the Swiss allowance, which was lower.

21 Following the birth of their second child, Albiona, on 30 June 2007, Mrs Xhymshiti applied, on 13 July 2007, for a German top-up child allowance in respect of that child as well.

22 Following that application, on 5 September 2007 the FKL cancelled the child allowance in respect of Albion, on the ground that Mr Xhymshiti was receiving child allowance for that child in Switzerland.

23 On 12 October 2007, Mrs Xhymshiti applied again to the FKL for child allowance for her two children. The FKL received that application on 15 October 2007 and rejected it on 25 October 2007, without referring to either child by name. It took the view that, in so far as Mr and Mrs Xhymshiti did not come within the scope of the EU-Switzerland Agreement by reason of their nationalities, it was not possible to grant them top-up child allowance pursuant to Regulations No 1408/71 and No 574/72.

24 On 19 February 2008 the FKL dismissed Mrs Xhymshiti's challenge to the rejection decision. In its decision confirming the initial rejection, the FKL stated that, as from June 2007, the child Albiona was in receipt of a non-German benefit which was comparable to the German child allowance, and that the fact that that benefit was lower in amount than the German allowance was irrelevant.

25 Mrs Xhymshiti accordingly brought an action before the referring court against the rejection decision of 25 October 2007 and the decision of 19 February 2008 on her challenge. She also applied for payment of the German child allowance to which, in her view, she was entitled.

26 As it has doubts as to the applicability of Regulation No 859/2003 and, by extension, of Regulations No 1408/71 and No 574/72 to nationals of non-member countries in a situation such as that of Mr and Mrs Xhymshiti, the Finanzgericht Baden-Württemberg (Finance Court of Baden-Württemberg) (Germany), before which the case has been brought, decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. In cases in which a national of a non-member country is lawfully resident in a Member State of the European Union and works in [Switzerland], does Regulation … No 859/2003 apply to him and his spouse, who is also a national of a

non-member country, in their Member State of residence, with the result that the Member State of residence is obliged to apply Regulations … No 1408/71 and … No 574/72 to that employed person and his spouse?

2. If the answer to the first question is in the negative: in the circumstances set out in the first question, are Articles 2, 13 and 76 of Regulation … No 1408/71 and Article 10(1)(a) of Regulation … No 574/72 to be interpreted as meaning that a mother who is a national of a non-member country may be refused family benefits in her Member State of residence on the basis of the fact that she is a national of a non-member country, even though the child concerned is a Union citizen?'

Consideration of the questions referred

The first question

27 By its first question, the referring court asks, essentially, whether Regulation No 859/2003 is applicable to nationals of non-member countries in a situation such as that of Mr Xhymshiti and his wife.

28 It should be noted in that regard that, under Article 1 of Regulation No 859/2003, a national of a non-member country must fulfil two conditions in order for the provisions of Regulations No 1408/71 and No 574/72 to be applicable in respect of that person and the members of his family. He must, first, be legally resident in a Member

State and, secondly, not be in a situation which is confined in all respects within a single Member State. Recital 12 in the preamble to Regulation No 859/2003, which elaborates on the second condition, is to the effect that this concerns, inter alia, the situation of a national of a non-member country who has links only with a non-member country and a single Member State.

29 With regard, initially, to the first condition, it must be observed that, in the light of the information provided by the referring court, both Mr Xhymshiti and his wife are legally resident in Germany and satisfy the condition of being in possession of a German residence permit within the terms of the Annex to Regulation No 859/2003. The first condition may therefore be considered to be met.

30 Turning, next, to the second condition, it is clear, as the German Government has stated in its written observations and as is indicated in the order for reference, that Mr Xhymshiti's situation does not have any links to more than one Member State. The fact that he works in Switzerland is irrelevant in this regard.

31 It is, however, established, as is stated by both the Commission of the European Communities and the referring court, that, for the purposes of the application of Regulations No 1408/71 and No 574/72, the Swiss Confederation is to be equated with a Member State of the European Union.

32 Such a conclusion necessarily follows in the light of Article 1 of Annex II to the EU-Switzerland Agreement, concerning the coordination of social security schemes. Article 1(1) requires the contracting parties to apply among themselves the

Community acts to which reference is made, as in force at the date of signature of that agreement and as amended by section A of that annex.

33 Moreover, according to Article 1(2) of that annex, '[t]he term "Member State(s)" contained in the acts referred to in section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant Community acts'.

34 Both Regulation No 1408/71 and Regulation No 574/72 are mentioned in section A of Annex II to the EU-Switzerland Agreement, entitled 'Acts referred to'. It follows that the provisions of those regulations cover, in addition to the Member States of the EU, also the Swiss Confederation.

35 It must be borne in mind, however, that the same does not hold true for Regulation No 859/2003, which is not one of the Community acts that the parties to the EU-Switzerland Agreement have undertaken to apply and which are, for that reason, mentioned in section A of Annex II to that agreement. It is common ground that section A lists some of the acts amending Regulations No 1408/71 and No 574/72, a fact which indicates that the parties to that agreement intended to set out, in that section, in the form of an individualised entry, each amendment to those legislative acts.

36 As rightly pointed out by the German Government in its written observations, the scheme established by that agreement, being restricted to the application of the acts referred to explicitly therein, is not intended to refer to those acts in their updated version. Consequently, even if Regulation No 859/2003 were to be regarded as being no more than an amendment to Regulation No 1408/71 and No 574/72, it cannot be applied under the EU-Switzerland Agreement. That regulation, which postdates the

EU-Switzerland Agreement, can, therefore, be included in the EU-Switzerland Agreement only following an amendment to that agreement itself.

37 It is thus clear that the fact that Mr Xhymshiti works in Switzerland is not a factor which extends his situation beyond the limits of one single Member State. In fact, his situation has links with only one non-member country and a single Member State, that is to say, respectively, the Swiss Confederation and the Federal Republic of Germany.

38 It follows that, since the second of the two conditions laid down in Article 1 of Regulation No 859/2003 is not fulfilled, that regulation does not apply to the situation of a person such as Mr Xhymshiti.

39 In the light of all the foregoing, the answer to the first question referred is that, in the case in which a national of a non-member country is lawfully resident in a Member State of the European Union and works in Switzerland, Regulation No 859/2003 does not apply to that person in his Member State of residence, in so far as that regulation is not among the Community acts mentioned in section A of Annex II to the EU-Switzerland Agreement which the parties to that agreement undertake to apply. Consequently, there is no obligation on the Member State of residence to apply Regulations No 1408/71 and No 574/72 to that employee and his spouse.

The second question

40 The second question seeks to elucidate whether the provisions of Regulations No 1408/71 and No 574/72 allow a Member State of residence to refuse to grant child allowance to a national of a non-member country, on grounds of her nationality, even though her children are European Union citizens.

41 It should be noted in that regard that, as evidenced by the answer to the first question, Mr and Mrs Xhymshiti do not come within the scope of Regulation No 859/2003, which means that Regulations No 1408/71 and No 574/72 do not apply to them either. Consequently, the grant of child allowance for their two children is governed exclusively by the legislation of the Member State of residence, that is to say, by German legislation.

42 The description of the German legislation in the order for reference indicates that the grant of German child allowance is subject to the condition of residence within German territory, as required by point (1) of Paragraph 62(1) of the EStG. The referring court observes that, although Mrs Xhymshiti satisfies that condition, she is none the less precluded from receiving those benefits under point (1) of Paragraph 65(1) of the EStG because her spouse receives comparable benefits in Switzerland.

43 It must be observed that European Union law does not limit the power of the Member States to organise their social security schemes and that, in the absence of harmonisation at European Union level, it is for the legislation of each Member State to lay down the conditions under which social security benefits are granted, as well as the amount of such benefits and the period for which they are granted (Case C-507/06 *Klöppel* [2008] ECR I-943, paragraph 16).

44 In that regard, the fact that Mr and Mrs Xhymshiti's children are European Union citizens cannot, by itself, make the refusal to grant child allowance in Germany unlawful where, as is evident from the referring court's findings, the statutory conditions which must be satisfied for the purposes of such a grant are not fulfilled.

45 In the light of the foregoing, the answer to the second question referred is that Articles 2, 13 and 76 of Regulation No 1408/71 and Article 10(1)(a) of Regulation No 574/72 are irrelevant in respect of a national of a non-member country in the situation of the claimant in the main proceedings, in so far as her situation is governed by the legislation of the Member State of residence. The fact that that national's children are citizens of the European Union cannot, by itself, make the refusal to grant child allowance in the Member State of residence unlawful where, as is evident from the referring court's findings, the statutory conditions which must be satisfied for the purposes of such a grant are not fulfilled.

Costs

46 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Eighth Chamber) hereby rules:

1. **In the case in which a national of a non-member country is lawfully resident in a Member State of the European Union and works in Switzerland, Council Regulation (EC) No 859/2003 of 14 May 2003 extending the provisions of Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 to nationals of third countries who are not already covered by those provisions solely on the ground of their nationality does not apply to that person in his Member State of residence, in so far as Regulation No 859/2003 is not among the Community acts mentioned in section A of Annex II to the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed at Luxembourg on 21 June 1999, which the parties to that agreement undertake to apply. Consequently, there is no obligation on the Member State of residence to apply Council Regulation (EEC) No 1408/71 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, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006, and Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, in the version amended and updated by Regulation No 118/97, to that employee and his spouse.**

2. **Articles 2, 13 and 76 of Regulation No 1408/71 and Article 10(1)(a) of Regulation No 574/72 are irrelevant in respect of a national of a non-member country in the situation of the claimant in the main proceedings, in so far as her situation is governed by the legislation of the Member State of residence. The fact that that national's children are citizens of the European Union**

cannot, by itself, make the refusal to grant child allowance in the Member State of residence unlawful where, as is evident from the referring court's findings, the statutory conditions which must be satisfied for the purposes of such a grant are not fulfilled.

[Signatures]