JUDGMENT OF THE COURT

5 February 2002 *

In Case C-255/99,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court concerning the minor

Anna Humer,

on the interpretation of Articles 3, 4(1)(h), 73 and 74 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), and of Articles 3(1) and 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

* Language of the case: German.

THE COURT,

composed of: P. Jann, President of the First and Fifth Chambers, acting for the President, F. Macken and N. Colneric (Presidents of Chambers), C. Gulmann, D.A.O. Edward (Rapporteur), A. La Pergola, M. Wathelet, R. Schintgen and V. Skouris, Judges,

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Ms Humer, by A. Frischenschlager, Rechtsanwalt,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Swedish Government, by A. Kruse, acting as Agent,

— the Commission of the European Communities, by P. Hillenkamp and W. Bogensberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Ms Humer, represented by A. Frischenschlager; of the Austrian Government, represented by C. Pesendorfer; of the Danish Government, represented by J. Molde, acting as Agent; of the Swedish Government, represented by A.-K. Holland, acting as Agent; and of the Commission, represented by W. Bogensberger, at the hearing on 5 December 2000,

after hearing the Opinion of the Advocate General at the sitting on 8 February 2001,

gives the following

Judgment

1 By order of 23 June 1999, received at the Court on 8 July 1999, the Oberster Gerichtshof (Supreme Court) (Austria) referred to the Court for a preliminary ruling under Article 234 EC two questions on the interpretation of Articles 3, 4(1)(h), 73 and 74 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71'), and of Articles 3(1) and 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 Those questions have been raised in proceedings brought by Anna Humer (hereinafter 'the applicant'), a minor child of divorced parents who is represented

by her mother, seeking payment from the Familienlastenausgleichsfonds (Family Costs Contribution Fund) of advances on outstanding maintenance payments due from her father.

Community legislation

3 Article 48(1), (2) and (3)(b) of the EC Treaty (now, after amendment, Article 39(1), (2) and (3)(b) EC) states:

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

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:

...

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

4 The purpose of Regulation No 1408/71 is to coordinate, within the framework of the free movement of persons, national social security legislation in accordance with the objectives of Article 51 of the EC Treaty (now, after amendment, Article 42 EC).

5 Article 1 of Regulation No 1408/71, entitled 'Definitions', provides:

'For the purpose of this Regulation:

...

(f) (i) *member of the family* means 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 or, in the cases referred to in Articles 22(1)(a) and 31, by the legislation of the Member State in whose territory such person resides; ...

...

...

(u) (i) the term *family benefits* means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h),

excluding the special childbirth or adoption allowances referred to in Annex II;

...

...'.

6 Article 2(1) of Regulation No 1408/71, defining the persons covered by the Regulation, provides:

'This Regulation shall apply 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 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.'

7 Article 3 of Regulation No 1408/71, dealing with equality of treatment, provides as follows:

'1. Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of the State.

2. ...

3. Save as provided in Annex III, the provisions of social security conventions which remain in force pursuant to Article 7(2)(c) and the provisions of conventions concluded pursuant to Article 8(1) shall apply to all persons to whom this Regulation applies.'

8 Article 4 of Regulation No 1408/71, which defines the matters covered by the Regulation, provides in paragraph (1)(h):

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

...

(h) family benefits.'

9 Article 73 of Regulation No 1408/71, entitled 'Employed or self-employed persons the members of whose families reside in a Member State other than the competent Member State', is worded 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.'

10 Article 74 of Regulation No 1408/71, entitled 'Unemployed persons the members of whose families reside in a Member State other than the competent Member State', provides as follows:

'An unemployed person who was formerly employed or self-employed and who draws unemployment benefits under the legislation of a Member State shall be entitled, in respect of the members of his family 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.'

National legislation

11 The Österreichische Bundesgesetz über die Gewährung von Vorschüssen auf den Unterhalt von Kindern (Unterhaltsvorschussgesetz) (Austrian Federal Law on the Grant of Advances for the Maintenance of Children), adopted in 1985 (BGBl. 1985, No 451) ('the UVG'), provides for the grant by the State, subject to the conditions which it lays down, of advances on maintenance payments.

12 Article 2(1) of the UVG provides:

'Minor children who are ordinarily resident in Austria and are either Austrian nationals or stateless shall be entitled to advances ...'.

13 Article 3 of the UVG provides:

'Advances shall be granted where:

1. a writ of execution enforceable in Austria exists in respect of the legal right to maintenance payments and

2. execution in respect of current maintenance payments ... or, where the person in default of payment of maintenance clearly has no income or other form of regular remuneration, execution ... has not covered in full, over the six months immediately prior to the submission of that application for the grant of an advance, even one of the maintenance payments due. In that respect, maintenance arrears when recovered shall be set off against the current maintenance debt.'

14 Article 4 of the UVG provides that, in certain circumstances, advances are to be granted even where execution appears to have no prospect of success or where no entitlement to maintenance has been determined.

15 Articles 30 and 31 of the UVG provide that the public authorities are to be subrogated to a child's claims for maintenance on which advances have been made. Where the person in default of payment of maintenance makes no payments, the debt may be recovered by distraint.

16 The grant of an advance on maintenance does not depend on the recipient being in a state of indigence and involves no exercise of discretion in the assessment of the particular case.

17 The UVG was adopted pursuant to Article 10(1), point 6, of the Austrian Constitution, which confers competence in 'civil' matters on the Austrian Federal State.

The dispute in the main proceedings and the questions submitted for preliminary ruling

18 The applicant in the main proceedings, Anna Humer, is a minor born on 10 September 1987 and, like her parents, is an Austrian national. Her parents divorced on 9 March 1989 and the mother obtained sole custody of her daughter.

19 The two parents at first continued to reside in Austria. In 1992 the mother moved to France with her daughter and, since then, both have been ordinarily resident there. The father is said to have continued to reside in Austria up to the time of his death on 13 March 1999.

20 On 2 November 1993 the father assumed an obligation under a court settlement to pay monthly maintenance payments of ATS 4 800 for his daughter. The father was at that time employed in a commercial capacity and continued in that occupation until at least 31 January 1998. According to the information provided to the Court, it would appear that he was unemployed from that date, although his professional situation at the time of his death remains unknown.

21 While still resident in Austria, the child's mother was a religious studies teacher. In reply to a question put by the Court, counsel for the applicant in the main proceedings indicated that the mother taught pursuant to a certificate of teaching proficiency issued to her by the Catholic Church and recognised pursuant to the Concordat in force in Austria.

22 After transferring her residence to France, the applicant's mother was faced with the problem that her certificate of proficiency was not recognised in France. She was, however, able to teach German in private schools and at the same time followed a course of studies at the University of Nantes, on completion of which, in 1994, she obtained a diploma allowing her to teach German as a modern foreign language.

23 On 24 July 1998 the applicant, represented by her mother, applied to the Austrian State for advances on maintenance payments at the rate of ATS 4 800 per month from 1 July 1998 for a period of three years. Her counsel claimed that, despite repeated enforcement measures, her father's maintenance payments were several months in arrears and that current monthly payments had not been made at all.

24 Basing itself on Article 2(1) of the UVG, the court of first instance in Austria dismissed that application on the ground that the child and her mother, who had custody of her, were ordinarily resident in France. The appeal court set that decision aside and, pursuant to Article 3 of the UVG, awarded the applicant advances on maintenance payments at the rate of ATS 4 800 per month from 1 July 1998 to 30 June 2001. That court took the view that Articles 6, first paragraph, and 52 of the EC Treaty (now, after amendment, Articles 12 EC, first paragraph, and 43 EC) precluded application of a discriminatory rule such as the condition of residence in Austria laid down by the UVG.

25 An appeal on a point of law ('Revision') was brought before the Oberster Gerichtshof, which decided to stay proceedings and refer the following questions to the Court for a preliminary ruling:

'I. (a) Do advances on maintenance payments to the minor children of working persons, or unemployed persons drawing unemployment benefit under Austrian legislation, which are payable in respect of children under the Austrian federal law on the grant of advances on maintenance (Unterhaltsvorschussgesetz 1985 [Law on Advances on Maintenance Payments 1985], hereinafter UVG — current version in BGBl., p. 451) constitute family benefits for the purposes of Article 4(1)(h) 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, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 and amended by Council Regulation (EEC) No 3427/89 of 30 October 1989, and is Article 3 of the regulation, on equality of treatment, therefore also applicable in such a case?

(b) Do Articles 73 and 74 of Regulation No 1408/71 entitle a child of a marriage who is resident with his or her mother in a Member State other than Austria and whose father is resident in Austria and is working there, or unemployed and drawing unemployment benefit under Austrian legislation, to the award of an advance on maintenance payments under the Unterhaltsvorschussgesetz referred to in paragraph (a) above?

II. If the answer to one of the questions under I is in the negative:

(a) Are advances on maintenance payments under the Unterhaltsvorschussgesetz referred to in Question I(a) social advantages within the meaning

of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community?

(b) Does the fact that the child has to be resident in Austria in order to be awarded advances on maintenance payments constitute a prohibited limiting provision under the second indent of Article 3(1) of Regulation (EEC) No 1612/68 in the light of the right to freedom of movement for workers enshrined in Article 48 of the EC Treaty?

(c) Do the provisions of Regulation No 1612/68 give rise to an entitlement, in the person of the child of a worker, to the award of advances on maintenance payments?'

Findings of the Court

26 Having regard to the date of the facts in the main proceedings, the applicable version of Regulation No 1408/71 appears to be that amended and updated by Regulation No 118/97, with the result that it is this latter version which requires to be interpreted. However, the relevant provisions of Regulation No 1408/71 have in substance remained the same.

27 Further, there is no need to examine the issue, raised in part (a) of the first question, of whether Article 3(1) of Regulation No 1408/71 applies, given that the applicant in the main proceedings is an Austrian national.

The first question

28 In the two limbs of its first question, which it is appropriate to examine together, the national court seeks to ascertain, first, whether a benefit such as the advance on maintenance payments provided for by the UVG is a family benefit within the meaning of Regulation No 1408/71, second, whether a minor child in a situation identical to that of the applicant comes within the scope *ratione personae* of that regulation, and, third, whether such a minor child may invoke Articles 73 and 74 of Regulation No 1408/71 in order to claim entitlement to a benefit of that kind.

The definition of a family benefit

29 In essence the question is, first, whether a benefit such as the advance on maintenance payments provided for by the UVG is a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71.

30 This question is identical to that posed by the Oberster Gerichtshof in proceedings which also concerned the compatibility of the UVG with Community law and which resulted in the Court's judgment of 15 March 2001 in Case C-85/99 *Offermanns* [2001] ECR I-2261.

31 In paragraph 41 of that judgment, the Court ruled that the expression 'to meet family expenses' in Article 1(u)(i) of Regulation No 1408/71 is to be interpreted as referring, in particular, to a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance (*Unterhalt*) of children.

32 In paragraphs 42 to 46 of *Offermanns*, the Court examined the constituent elements of the advance on maintenance payments provided for by the UVG, in particular its purposes and the conditions under which it may be granted. The Court noted in particular that the reasons given by the Austrian legislature when adopting the UVG were to ensure the maintenance of minor children in cases where their mothers are left to cope alone with their children and, in addition to the heavy burden of raising their children, find themselves faced with the additional difficulty of obtaining maintenance for them from the father. The Court further pointed out that, according to the Oberster Gerichtshof, attenuating such a situation is the reason for which 'the State must step in and take the place of the person in default of payment of maintenance, pay advances on maintenance and seek recovery from the person in default'.

33 The Court accordingly ruled, in paragraph 49 of *Offermanns*, that a benefit such as an advance on maintenance payments provided for by the UVG does constitute a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71.

The scope *ratione personae* of Regulation No 1408/71

34 Second, the question posed by the national court seeks implicitly to ascertain whether a minor child in the situation of the applicant comes within the scope *ratione personae* of Regulation No 1408/71.

35 In order to reply to that question, it is necessary to examine whether such a child is a member of the family of an employed or self-employed person within the meaning of Article 2 of Regulation No 1408/71, read in the light of Article 1(f)(i) thereof.

36 *In casu*, it follows from paragraphs 20 to 22 of the present judgment that both the father and the mother of the applicant were, at the date on which the latter applied for advances on her maintenance payments, either employed or out of work. Further, it is common ground that, at the material time, the applicant was a 'member of the family' of each of her parents.

37 It follows that a child in the same situation as the applicant comes within the scope *ratione personae* of Regulation No 1408/71.

Is it possible for a minor child in a situation such as that of the applicant to enforce a right to the advance on maintenance payments under Articles 73 and 74 of Regulation No 1408/71?

38 Third, the national court seeks more specifically to determine whether Articles 73 and 74 of Regulation No 1408/71 are to be construed as founding the entitlement of a minor child in the position of the applicant to an advance on maintenance payments under legislation such as the UVG.

39 In this regard, the purpose of Articles 73 and 74 of Regulation No 1408/71 is precisely to guarantee members of the family residing in a Member State other than the competent State the grant of the family benefits provided for by the applicable legislation (see, with regard to Article 73 of Regulation No 1408/71, Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 32).

40 More particularly, those articles are intended to prevent Member States from making entitlement to and the amount of family benefits dependent on residence

of the members of the worker's family in the Member State providing the benefits, so that Community workers are not deterred from exercising their right to freedom of movement (see, *inter alia*, Case C-12/89 *Gatto* [1990] ECR I-557, summary publication, and *Hoever and Zachow*, cited above, paragraph 34).

41 As has been held in paragraphs 33 and 36 above, the benefit at issue here has the characteristics of a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71 and there is nothing to prevent the applicant having the status of a member of the family of a worker or former worker for the purposes of Article 2(1) of Regulation No 1408/71, read in the light of Article 1(f)(i) thereof.

42 Admittedly, as the Swedish Government has pointed out, Regulation No 1408/71 does not expressly cover family situations following a divorce. However, contrary to that Government's argument, there is nothing to justify the exclusion of such situations from the scope of Regulation No 1408/71.

43 One of the normal consequences of a divorce is that custody of 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 become established in another Member State in order to work there. In such a case, the residence of the minor child will also be transferred to that other Member State.

44 In the present case, it is common ground that the applicant would have been entitled to the advance on maintenance payments had she continued to reside in Austria. The only reason for her exclusion from the benefit of that advance lies in the fact that her mother, who has custody of her, has exercised her right of free movement, which activated the residence clause contained in the UVG.

45 Two objections have been raised by the Austrian and Swedish Governments and by the Commission against application of Articles 73 and 74 of Regulation No 1408/71 in the present case, both of which rest on the fact that the UVG establishes an original right vested in the child herself.

46 It is contended, first, that, in a situation such as the present, no one is exercising the right of free movement for workers conferred by the Treaty. The parent subject to the legislation of the Member State providing the benefit, *in casu* the father, has not exercised that right, while the transfer to another Member State of the minor child, who is the beneficiary of the benefit, does not result from the exercise by that child of the right of free movement enjoyed by workers.

47 Second, Articles 73 and 74 of Regulation No 1408/71 provide that it is the parent working in the Member State providing the benefit who must apply for family benefits on behalf of the members of his or her family. In a situation such as the present it is the minor child who, in order to overcome the failure by that parent to comply with his maintenance obligations, seeks directly to invoke those provisions.

48 With regard to the first objection, it follows from the title of Regulation No 1408/71 and from Article 2 thereof that this regulation governs the application of social security schemes to members of the family of employed persons or self-employed persons moving within the Community, with the result that, if a member of the family of a worker resides in a Member State other than that in which the worker resides, the provisions of Regulation No 1408/71 are, in principle, applicable (see, along these lines, Case 115/77 *Laumann* [1978] ECR 805, paragraph 5, and Case C-194/96 *Kulzer* [1998] ECR I-895, paragraph 30).

49 *A fortiori*, the same holds true where, as in the present case, the transfer of the worker's child, a member of the worker's family, results from the exercise by that worker's former spouse of her right of free movement.

50 With regard to the second objection, it is true that the UVG establishes an original right vested in the child. That said, family benefits by their nature cannot be regarded as payable to an individual in isolation from his or her family circumstances (see *Hoever and Zachow*, paragraph 37). It follows, as regards application of Articles 73 and 74 of Regulation No 1408/71, first, that the legal classification of the benefit under domestic law has no bearing on their interpretation and, second, that it is irrelevant that the person to whom that benefit is to be awarded is a member of the worker's family rather than the worker himself.

51 According to the Court's case-law, the spouse of an employed person can directly claim a right to family benefits under Article 73 of Regulation No 1408/71 provided that he or she is a member of the family of a worker who fulfils the conditions laid down in Article 73 and provided also that under national legislation the family benefits concerned are provided for family members (see Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 26, and *Hoever and Zachow*, paragraphs 30 and 38). There is nothing to prevent that reasoning from being extended to all family members.

52 It follows from all of the foregoing that a member of the family of a worker, including a minor child such as the applicant, may directly invoke Articles 73 and 74 of Regulation No 1408/71 in order to apply, without the intervention of the worker himself, for the grant of a family benefit in circumstances where the conditions governing application of those articles are otherwise satisfied.

53 This conclusion is valid *a fortiori* where, as in the present case, entitlement to the benefit in question arises precisely because of the worker's failure to meet his maintenance obligations towards his family.

54 In light of the foregoing, the answer to the first question must be that:

— a benefit such as the advance on maintenance payments provided for by the UVG is a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71;

— a person, one or other of whose parents is an employed person or is out of work, comes within the scope *ratione personae* of Regulation No 1408/71 as a member of the family of a worker within the meaning of Article 2(1) of Regulation No 1408/71, read in the light of Article 1(f)(i) thereof;

— Articles 73 and 74 of Regulation No 1408/71 are to be construed as meaning that, where a minor child resides with the parent who has custody in a Member State other than the Member State providing the benefit, and where the other parent, who is under an obligation to pay maintenance, works or is unemployed in the Member State providing the benefit, that child is entitled to receive a family benefit such as the advance on maintenance payments provided for by the UVG.

The second question

55 As the answer to the first question is in the affirmative, there is no need to reply to the second question.

Costs

56 The costs incurred by the Austrian, Danish, German and Swedish Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Oberster Gerichtshof by order of 23 June 1999, hereby rules:

1. **A benefit such as the advance on maintenance payments provided for by the Österreichische Bundesgesetz über die Gewährung von Vorschüssen auf den Unterhalt von Kindern (Unterhaltsvorschussgesetz) (Austrian Federal Law on the Grant of Advances for the Maintenance of Children), adopted in 1985, is a family benefit within the meaning of Article 4(1)(h) 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, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996.**

2. A person, one or other of whose parents is an employed person or is out of work, comes within the scope *ratione personae* of Regulation No 1408/71, as amended, as a member of the family of a worker within the meaning of Article 2(1) of Regulation No 1408/71, read in the light of Article 1(f)(i) thereof.

3. Articles 73 and 74 of Regulation No 1408/71 are to be construed as meaning that, where a minor child resides with the parent who has custody in a Member State other than the Member State providing the benefit, and where the other parent, who is under an obligation to pay maintenance, works or is unemployed in the Member State providing the benefit, that child is entitled to receive a family benefit such as the advance on maintenance payments provided for by the Unterhaltsvorschussgesetz.

Jann	Macken	Colneric
Gulmann	Edward	La Pergola
Wathelet	Schintgen	Skouris

Delivered in open court in Luxembourg on 5 February 2002.

R. Grass

Registrar

G.C. Rodríguez Iglesias

President