JUDGMENT OF THE COURT (First Chamber)
4 July 1990 *

In Case C-117/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht for a preliminary ruling in the proceedings pending before that court between

Klaus Jürgen Kracht

and

Bundesanstalt für Arbeit

on the interpretation of Articles 73 and 76 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 (Official Journal, English Special Edition 1971 (II), p. 416), as amended by Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6),

THE COURT (First Chamber)

composed of: Sir Gordon Slynn, President of Chamber, R. Joliet et G. C. Rodríguez Iglesias, Judges,

Advocate General: W. Van Gerven
Registrar: J. A. Pompe, Deputy Registrar

* Language of the case: German.

after considering the observations submitted on behalf of

the Government of the Italian Republic, by Pier Giorgio Ferri, avvocato dello Stato, acting as Agent,

the Commission of the European Communities, by Dimitrios Gouloussis and Jörn Pipkorn, members of its Legal Department, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Government of the Federal Republic of Germany, represented by J. Karl, Oberregierungsrat at the Ministry of Economic Affairs, and of the Commission at the hearing on 8 March 1990,

after hearing the Opinion of the Advocate General delivered at the sitting on 29 March 1990,

gives the following

Judgment

1 By order of 22 February 1989, which was received at the Court on 10 April 1989, the Bundessozialgericht (Federal Social Court) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions concerning the interpretation of Article 76 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 by Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6).

2 Those questions arose in a dispute between Mr Kracht and the Bundesanstalt für Arbeit (Federal Employment Office) concerning a refusal to pay family allowances.

3 Mr Kracht is an employed person covered by the Bundeskindergeldgesetz (German Federal Law on Child Allowances). His wife, an Italian national, resides in Italy with their children Marco, born on 3 May 1964 and Lukas Oliver, born on 11 March 1966. She works for a bank in Milan.

4 Mrs Kracht received family allowances under Italian law in respect of her two sons only until 31 December 1983 because, as from that date, she ceased to apply for them. Nor did Mrs Kracht apply for the grant of family allowances from the competent Italian institution when Lukas Oliver resumed his studies in September 1986.

5 After the Bundesanstalt für Arbeit, the defendant in the main proceedings, refused to pay him the family allowances in question, Mr Kracht instituted proceedings before the Sozialgericht (Social Court) Oldenburg, which, by judgment of 12 June 1987, annulled the defendant's decisions. In its judgment of 22 September 1987, the Landessozialgericht (Higher Social Court) Niedersachsen dismissed the defendant's appeal against the order to pay family allowances in respect of Marco as from 1 January 1984 and in respect of Lukas Oliver as from 1 September 1986. By order of 22 February 1989, the Tenth Chamber of the Bundessozialgericht, hearing the defendant's appeal on a point of law, stayed the proceedings and requested the Court to give a preliminary ruling on the following questions:

'(1) Is entitlement to benefits under Article 73 of Regulation (EEC) No 1408/71 to be suspended pursuant to Article 76 of that regulation if family benefits or family allowances are no longer payable in the Member State in which the members of the family reside only because they are not applied for?

(2) Is entitlement to benefits under Article 73 of Regulation (EEC) No 1408/71 to be suspended pursuant to Article 76 of that regulation if family benefits or family allowances are no longer payable in the Member State in which the members of the family reside only because they are no longer claimed as from an arbitrarily determined date?'

6 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 The two questions submitted by the national court must be considered together. They seek in substance to ascertain whether Article 76 of Regulation No 1408/71 requires entitlement to benefits under Article 73 of that regulation to be suspended where the family benefits or family allowances are no longer payable in the Member State in whose territory the members of the family reside solely because they have not been applied for or re-applied for.

8 Article 73(1) of Regulation No 1408/71, as amended by Regulation No 2001/83, provides as follows:

'*Employed persons*

1. An employed person 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.'

9 Article 76 of Regulation No 1408/71, as amended by Regulation No 2001/83, provides as follows:

'*Rules of priority in cases of overlapping entitlement to family benefits or family allowances in pursuance of the provisions of Articles 73 and 74 by reason of the pursuit of a professional or trade activity in the country of residence of the members of the family*

Entitlement to family benefits or family allowances under the provisions of Articles 73 and 74 shall be suspended if, by reason of the pursuit of a professional or trade activity, family benefits or family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing.'

10 Article 76(2) of Regulation No 1408/71 as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (Official Journal 1989 L 331, p. 1), which allows the Member State of employment to suspend entitlement to family benefits if an application for benefits is not made in the Member State in whose territory the members of the family are residing, is applicable only as from 1 May 1990. Accordingly it does not affect the answer to the questions submitted by the national court.

11 In its judgments in Case 191/83 *Salzano* v *Bundesanstalt für Arbeit* [1984] ECR 3741 and in Case 153/84 *Ferraioli* v *Deutsche Bundespost* [1986] ECR 1401, the Court ruled that there is no suspension of the entitlement to family allowances payable in the country of employment of one of the parents when the other parent resides with the children in another Member State and pursues there a professional or trade activity but does not receive family allowances for the children on the ground that not all the conditions laid down in the legislation of that Member State for the actual receipt of such allowances, including the condition that they must first be applied for, are satisfied.

12 However, the national court asks the Court of Justice to reconsider that interpretation because in its view Article 76 of Regulation No 1408/71 constitutes an overriding rule of priority which cannot be rendered ineffective by the will of the person entitled to benefit. At the hearing, the Government of the Federal Republic of Germany endorsed that argument. It pointed out that the exclusion of any possibility of choice on the part of persons entitled to benefit would make it possible to avoid practical difficulties, for instance the fact that these persons could alter the apportionment of the financial burdens or acquire overlapping entitlement to benefits in the country in which the family resides and in the country of employment, without in any way being placed at a disadvantage, since, as the Court has consistently held, the country of employment must pay the difference where the benefits which it grants are higher than those provided for in the State in which the migrant worker's family resides. Finally, the Federal Government stated that the new version of Article 76 is simply a rule of interpretation which permits any doubts in this area to be dispelled, and makes no new provision.

13 Those arguments cannot be upheld.

14 As the Court has stated on various occasions, the objective of Article 51 of the EEC Treaty, namely to establish freedom of movement for workers, must be taken into account in interpreting regulations adopted by the Council in the field of social security for migrant workers. The interpretation of Article 76 in the abovementioned judgments is consistent with that objective.

15 The Court has interpreted Article 76 as being designed solely to restrict the possibility of overlapping entitlement to benefits. Construed in those terms, that provision complements Article 73 of the same regulation, which is designed to make it easier for migrant workers to receive family allowances in the State in which they are employed, when their family has not moved with them.

16 If, however, the provision in question were to be interpreted as an overriding rule of priority, as the Federal Government maintains, it would have the effect of restricting the range of facilities enjoyed by migrant workers by virtue of Article 73.

17 Nor, finally, is it possible to accept the Federal Government's argument that the new version of Article 76 of Regulation No 1408/71 as amended by Regulation No 3427/89 is intended solely to clarify a legal situation which has given rise to the most varied interpretations, since it is clearly contrary to Article 3 of Regulation No 3427/89, according to which the amended version of Article 76 is applicable only as from 1 May 1990, even though all the other provisions of that regulation are stated to be applicable as from 15 January 1986.

18 The answer to the questions submitted by the national court must therefore be that Article 76 of Regulation No 1408/71, as amended by Regulation No 2001/83 of 2 June 1983, must be interpreted as meaning that entitlement to benefits under Article 73 of that regulation is not to be suspended where benefits or allowances are no longer payable in the Member State in whose territory the members of the family reside solely because they have not been applied for or re-applied for.

Costs

19 The costs incurred by the Italian Government, the Government of the Federal Republic of Germany and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of 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 (First Chamber),

in answer to the questions referred to it by the Bundessozialgericht, by order of 22 February 1989, hereby rules:

Article 76 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 by Regulation (EEC) No 2001/83 of 2 June 1983, must be interpreted as meaning that entitlement to benefits under Article 73 of that regulation is not to be suspended where benefits or allowances are no longer payable in the Member State in whose territory the members of the family reside solely because they have not been applied for or re-applied for.

Slynn Joliet Rodríguez Iglesias

Delivered in open court in Luxembourg on 4 July 1990.

J.-G. Giraud
Registrar

Gordon Slynn
President of the First Chamber