Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 3 February 2022 [1]

Case C-576/20

CC
v
Pensionsversicherungsanstalt

(Request for a preliminary ruling from the Oberster Gerichtshof (Supreme Court, Austria))

(Reference for a preliminary ruling – Social security for migrant workers – Coordination of social security systems – Article 44(2) of Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 – Examination of entitlement to an old-age pension – Taking into account child-raising periods completed in another Member State – Conditions – Principle of equal treatment of facts – Professional activity exercised in only one Member State)

I. Introduction

1. The Oberster Gerichtshof (Supreme Court, Austria) has referred to the Court questions regarding the interpretation of Article 44(2) of Regulation (EC) No 987/2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems. [2]

2. That reference was made in the context of proceedings between CC ('the Appellant') and the Pensionsversicherungsanstalt ('the PVA'), the institution responsible for the statutory old-age insurance scheme in Austria. It concerns the refusal by the latter to take into account, for the purpose of calculating the Appellant's old-age pension, the periods of time that she dedicated to raising her children in Belgium and Hungary.

3. Within that context, the questions relate more specifically to the conditions under which the competent institution of a Member State, where a person has worked, is required to apply that Member State's legislation to child-raising periods completed by that person in one or more other Member States.

[1] Original language: English.

[2] Regulation of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 1).

4. The Court has previously ruled, in the context of the application of Regulation (EEC) No 1408/71,[3] which predated Regulations No 883/2004 and No 987/2009 and did not contain any provision on that particular issue, that that first Member State must apply its legislation to such child-raising periods where the latter are 'sufficiently closely linked' to periods of employment or self-employment previously completed by that same person in its territory.

5. The crux of the issue in the present case is whether that judicial solution still applies now that the legislature has adopted Article 44(2) of Regulation No 987/2009 and expressly listed a set of criteria designed to clarify that obligation. As I will explain below, I am of the opinion that that provision has superseded the 'sufficiently close link' test.

II. Legal framework

A. European Union law

1. Regulation (EC) No 883/2004

6. Title II of Regulation (EC) No 883/2004,[4] entitled 'Determination of the legislation applicable' includes, inter alia, Article 11, which provides:

'1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

…

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

…

(e) any other person to whom subparagraphs (a) to (d) do not apply shall be subject to the legislation of the Member State of residence, without prejudice to other provisions of this Regulation guaranteeing him benefits under the legislation of one or more other Member States.'

7. By virtue of Article 87 of the same regulation:

'1. No rights shall be acquired under this Regulation for the period before its date of application.

2. Any period of insurance and, where appropriate, any period of employment, self-employment or residence completed under the legislation of a Member State prior to the date of application of

[3] Regulation of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416).

[4] Regulation of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1).

this Regulation in the Member State concerned shall be taken into consideration for the determination of rights acquired under this Regulation.'

8. In accordance with Article 91 of Regulation No 883/2004, that regulation shall apply from the date of entry into force of its implementing regulation, namely Regulation No 987/2009, on 1 May 2010. It shall repeal Regulation No 1408/71.

2. Regulation No 987/2009

9. Regulation No 987/2009 lays down the procedure for implementing Regulation No 883/2004, pursuant to Article 89 of the latter regulation.

10. Pursuant to recital 14 of Regulation No 987/2009:

'Certain specific rules and procedures are required in order to define the legislation applicable for taking account of periods during which an insured person has devoted time to bringing up children in the various Member States.'

11. Article 44 of the same regulation states:

'1. For the purposes of this Article, "child-raising period" refers to any period which is credited under the pension legislation of a Member State or which provides a supplement to a pension explicitly for the reason that a person has raised a child, irrespective of the method used to calculate those periods and whether they accrue during the time of child-raising or are acknowledged retroactively.

2. Where, under the legislation of the Member State which is competent under Title II of [Regulation No 883/2004], no child-raising period is taken into account, the institution of the Member State whose legislation, according to Title II of [Regulation No 883/2004], was applicable to the person concerned on the grounds that he or she was pursuing an activity as an employed or self-employed person at the date when, under that legislation, the child-raising period started to be taken into account for the child concerned, shall remain responsible for taking into account that period as a child-raising period under its own legislation, as if such child-raising took place in its own territory.

…'

12. Article 93 of Regulation No 987/2009 reads as follows:

'Article 87 of [Regulation No 883/2004] shall apply to the situations covered by the implementing Regulation.'

B. National law

13. Paragraph 16(3a) of the Allgemeines Pensionsgesetz (General Law on Pensions; 'the APG') (BGBl. I, 142/2004) provides, in particular, that substitute qualifying periods spent raising children pursuant to Paragraph 227a of the Allgemeines Sozialversicherungsgesetz (General Law on Social Security; 'the ASVG') (BGBl. 189/1955) and to Paragraph 116a of the Gewerbliches

Sozialversicherungsgesetz (Law on social insurance for persons engaged in trade and commerce; 'the GSVG') (BGBl. 560/1978) shall also be deemed to be insurance months for the purpose of fulfilling the minimum insurance period pursuant to Paragraph 4(1) of that legislation.

14. Paragraph 227a of the ASVG states:

'(1) In addition, where an insured person has actually been the person primarily responsible for rearing her (his) child (subparagraph 2), such child-rearing in the country, up to a maximum of 48 calendar months from the birth of the child, shall constitute a substitute qualifying period after 31 December 1955 and before 1 January 2005 in the class of pension insurance within which the last preceding contribution period falls or, where no such period exists, within which the next following contribution period falls. In the event of a multiple birth, the 48-calendar-month period is extended to 60 calendar months.

…'

15. Paragraph 116a of the GSVG is, in essence, identical to Paragraph 227a of the ASVG.

III. Facts, national proceedings and the questions referred

16. On 11 October 2017, the Appellant applied to the PVA for the grant of an old-age pension. She established that, from 4 October 1976 to 28 August 1977, she had completed a first period of insurance of 11 months on the basis of her compulsory insurance contributions as an apprentice in Austria and, from 1 January 1982 to 30 September 1986, a second period of insurance of 57 months on the basis of her self-employment in that same Member State.

17. In October 1986, the Appellant went to the United Kingdom to study. She stayed there until she moved to Belgium at the beginning of November 1987. Whilst in Belgium, she gave birth to two children; the first in December 1987 and the second in February 1990. Together with her children, she resided in Belgium at first, then in Hungary between 5 December 1991 and 31 December 1992, and finally in the United Kingdom from 1 January 1993 to 8 February 1993.

18. From 5 December 1987 (the date on which her first child was born) to 8 February 1993 (the date on which she returned to Austria), the Appellant dedicated herself to bringing up her children. During that period, she was not gainfully employed.

19. After she returned to Austria, the Appellant continued to raise her children on a full-time basis. She then completed additional periods of self-employment until October 2017, at which point she retired.

20. By decision of 29 December 2017, the PVA granted the Appellant an old-age pension that included 14 months of 'substitute qualifying periods' in consideration for the time she spent raising her children from January 1993 to February 1994, in the United Kingdom and in Austria. [5]

[5] The PVA explained before the Court that it had included the time spent in the United Kingdom (from 1 January 1993 to 8 February 1993) in its calculation of the Appellant's pension rights, since the Appellant had initially indicated that she had been back in Austria as of 31 December 1992. That period was thus counted alongside the other child-raising periods completed on the Austrian territory and is not part of the 'disputed child-raising periods' defined in point 21 of that Opinion.

21. The Appellant challenged that decision on the ground that she was entitled to a higher old-age pension, given that the periods spent raising her children in Belgium and Hungary from 5 December 1987 to 31 December 1992 ('the disputed child-raising periods') ought to have also been taken into account as 'substitute qualifying periods'.

22. The PVA submitted that the Appellant did not meet the criteria set out in Article 44(2) of Regulation No 987/2009 with regard to those periods. First, she would not have been in gainful employment immediately prior to the date when the disputed child-raising periods would begin to be taken into account under Austrian law. Second, those periods would have been completed in Member States (namely, Belgium and Hungary) whose legislation already allowed for the time devoted to raising children to be taken into account.

23. The first-instance court, the Arbeits- und Sozialgericht Wien (Labour and Social Court, Vienna, Austria) dismissed the Appellant's claim on the ground that she did not meet the conditions laid down in Article 44(2) of Regulation No 987/2009. The Oberlandesgericht (Higher Regional Court, Vienna, Austria) upheld that decision. The Appellant subsequently brought an appeal to the Oberster Gerichtshof (Supreme Court, Austria), before which she requests that her action be upheld.

24. The referring court explains that Regulations No 883/2004 and No 987/2009 are applicable *ratione temporis* to the present case. It further finds that, because the Appellant was neither employed nor self-employed in Austria when she first began dedicating her time to the raising of her children, the disputed child-raising periods do not meet the requirements set out in Article 44(2) of Regulation No 987/2009.

25. In that regard, it notes that the purpose of Regulations No 883/2004 and No 987/2009 is not to harmonise or even approximate the social security systems of the Member States, but merely to coordinate them. Individuals such as the Appellant may not therefore expect that their move from one Member State to another will have no effect on their social security situation and that the competent authorities of the Member State in which they have worked will always treat child-raising periods completed in one or more other Member States (here, Belgium and Hungary) as though they had been completed in their own territory.

26. Nevertheless, it also considers that the circumstances in the main proceedings are similar to those that led to the judgment in *Reichel-Albert*,[6] in the context of the application of Regulation No 1408/71 (which has been repealed and replaced by Regulations No 883/2004 and No 987/2009). Following the Court's rationale in that judgment and in other previous judgments also adopted on the basis of Regulation No 1408/71 (namely, *Elsen*[7] and *Kauer*[8]), it would be sufficient, in order for Austrian legislation to apply to the disputed child-raising periods, to establish the existence of a 'sufficiently close link' between those periods and the qualifying periods of employment or self-employment completed in that Member State.

27. In that respect, the referring court emphasises the fact that, although the Appellant was not in Austria at the time when her children were born, it was in fact in that Member State only that she worked and completed qualifying periods of employment or self-employment. It also explains that since Regulation No 1408/71 was still in force at the time of the disputed child-raising periods, there are substantial grounds, in the light of the Court's aforementioned case-law, in favour of

6 Judgment of 19 July 2012 (C-522/10, EU:C:2012:475) ('*Reichel-Albert*').

7 Judgment of 23 November 2000 (C-135/99, EU:C:2000:647) ('*Elsen*').

8 Judgment of 7 February 2002 (C-28/00, EU:C:2002:82) ('*Kauer*').

applying the 'sufficiently close link' test to those periods. If it were not possible to do so, the Appellant would actually find herself in a situation less favourable to her own interests after the entry into force of Article 44(2) of Regulation No 987/2009 than prior to it. Such a change to her legal situation would occur long after she completed the disputed child-raising periods.

28. Consequently, the referring court harbours doubts as to whether the issue of the *applicability* of Austrian law to the disputed child-raising periods ought to be resolved with regard *solely* to Article 44(2) of Regulation No 987/2009. It wonders whether that provision may, in the present case, encroach upon the legitimate expectations that the Appellant may have derived from the Court's case-law relating to the application of Regulation No 1408/71.

29. In that context, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Article 44(2) of Regulation [No 987/2009] to be interpreted as precluding child-raising periods spent in other Member States from being taken into account by a Member State competent to grant an old-age pension – under whose legislation the applicant for a pension has pursued an activity as an employed or self-employed person throughout her [or his] working life, with the exception of those child-raising periods – solely on the ground that the applicant for a pension was not pursuing an activity as an employed or self-employed person at the date when, under the legislation of that Member State, the child-raising period started to be taken into account for the child concerned?

If the first question is answered in the negative:

(2) Is the first clause of Article 44(2) of Regulation [No 987/2009] to be interpreted as meaning that, under its legislation, the Member State which is competent under Title II of Regulation [No 883/2004] on the coordination of social security systems does not take child-raising periods into account generally, or that it does not take them into account only in a specific case?'

30. The request for a preliminary ruling, dated 13 October 2020, was registered on 4 November 2020. The Appellant, the PVA, the Czech, Spanish and Austrian Governments, as well as the European Commission have submitted written observations.

31. All the parties and interested parties, with the exception of the Czech Government, were represented at the hearing which took place on 11 November 2021.

IV. Analysis

32. Pursuant to Article 44(2) of Regulation No 987/2009, the competent authorities of a Member State in which a person has been employed or self-employed ('Member State A') must, for the purpose of granting an old-age pension, take into account child-raising periods completed by that person in another Member State ('Member State B') *as if such child-raising had been completed on its own territory* [9] where the following conditions are satisfied:

– No child-raising period is taken into account under the legislation of Member State B;

[9] Article 44(2) of Regulation No 987/2009 reflects the general principle of equal treatment that Article 5 of Regulation No 883/2004 seeks to codify (see also, to that effect, recital 5 of the latter regulation).

– The legislation of Member State A was previously applicable to the person concerned on the ground that he or she was pursuing an activity as an employed or self-employed person in that Member State; and

– That person continued to be subject to Member State A's legislation because of the said activity at the date when, under that Member State's legislation, the child-raising period began to be taken into account for the child concerned. [10]

33. By its questions, which I shall address in turn, the referring court asks the Court to clarify the material scope of that provision in two respects.

34. First, it wonders, in essence, whether the judicial solution adopted by the Court in its earlier case-law (and, more specifically, in *Reichel-Albert*) remains applicable in the context of the application of Article 44(2) of Regulation No 987/2009, so that, even where the third requirement listed above is not fulfilled, the competent authorities of Member State A would be required, provided that there is a 'sufficiently close link' between the relevant periods of employment or self-employment completed on their territory and the child-raising periods completed in Member State B, to apply their legislation to such periods.

35. Specifically, it wishes to know whether and, if so, to what extent, the 'sufficiently close link' test developed by the Court in the context of the application of the general rules contained in Regulation No 1408/71, which did not include any specific provision on child-raising periods, continues to be relevant in a situation where Article 44(2) of Regulation No 987/2009 deals directly with the issue of which Member State's legislation is applicable to such periods. That question stems from the fact that, in the context of the main proceedings, the disputed child-raising periods do not seem to meet the third requirement set out in that provision because the Appellant was not employed or self-employed in Austria on the date on which, pursuant to Austrian legislation, such periods would begin to be taken into account. Arguably, however, such periods would satisfy the 'sufficiently close link' test set out by the Court in its earlier case-law.

36. Second, the referring court seeks to clarify, in relation to the first requirement listed in point 32 above, whether Article 44(2) of Regulation No 987/2009 applies only to situations where Member State B does not, *in principle*, provide for the taking into account of child-raising periods in its legislation, or whether it also applies to those cases where such legislation does exist but the time spent raising children is not taken into account *in concreto* by that latter Member State. If the first approach were to be followed, then, in the context of the main proceedings, Austrian law would, in any case, *not* be applicable to the disputed child-raising periods if Belgian or Hungarian law contained a provision that would, *in principle*, allow for such periods to be taken into account. Pursuant to the second approach however, one would not merely have to verify whether such legislative provisions exist, but it would also be necessary to check whether, in the case at hand, the disputed child-raising periods have *in fact* been taken into account by the competent Belgian or Hungarian authorities.

[10] I note, in passing, that Article 44(3) of Regulation No 987/2009 makes clear that the obligation provided for in paragraph 2 of that same article does not apply if the person concerned is or becomes subject to the legislation of *another* Member State due to the pursuit of an employed or self-employed activity.

A. The first question

37. My analysis of the first question will be structured as follows. First, I will outline the Court's 'sufficiently close link' test in its case-law relating to the application of Regulation No 1408/71 (1). Then, I will explain why I consider that test to be no longer relevant under Regulations No 883/2004 and No 987/2009 and, more specifically, in the context of the application of Article 44(2) of that latter regulation (2). Finally, I will provide a few brief remarks as to why I think that the Appellant cannot legitimately expect her situation to be governed by the Court's earlier case-law (3).

1. The past: the Court's case-law in Elsen*,* Kauer *and* Reichel-Albert *and the 'sufficiently close link' test*

38. Prior to the entry into force of Regulations No 883/2004 and No 987/2009, the Court's case-law, as I understand it, revolved around a two-step approach based on:

– the applicability, in the light of the general criteria set out in Article 13(2) of Regulation No 1408/71, of the legislation of Member State A to child-raising periods completed in Member State B so long as there was a 'close link' or 'sufficiently close link' between those periods and periods of gainful occupation completed in Member State A (step 1); and

– the obligation, derived from EU primary law, for such legislation to treat the child-raising periods completed in Member State B as though they had been completed in Member State A (that is, to treat such periods equally) (step 2).

39. That two-step approach was first outlined in *Elsen*, a case which concerned the upbringing of a child in France while the parent responsible for raising that child worked, until the child's birth and also after her maternity leave, as a frontier worker in Germany, where she was subject to compulsory insurance. In that case, the Court found that the German social security legislation was applicable to Ms Elsen's situation because a 'close link' could be established between the periods of child-rearing that she completed in France and the periods that she completed in Germany by virtue of her occupational activity in that Member State (step 1).[11] It then examined whether that legislation was compatible with EU law (and more specifically with relevant Treaty provisions), given that it contained a condition that, in essence, made the entitlement to the old-age pension subject to the condition that the children be raised in Germany or could be considered to have been raised there (step 2).[12]

40. As part of step 1, the Court observed that, pursuant to the general criteria set out in Article 13(2)(a) and (b) of Regulation No 1408/71, a person employed or self-employed in the territory of one Member State would be subject to the social security legislation of that Member State even if he or she resided in the territory of another Member State.[13] In the proceedings in question, Ms Elsen could not be considered to have been 'employed' in Germany, within the meaning of that provision, during the periods that she dedicated to raising her child in France. Nevertheless, the Court found that because there was a 'close link' between those periods and Ms Elsen's periods of activity in Germany, Ms Elsen could not be regarded as having ceased all

[11] In paragraphs 26 and 27 of its judgment.

[12] In paragraph 29 et seq.

[13] Ibid., paragraph 25.

'occupational activity' and as being subject for that reason to the legislation of the Member State in which she resided (France). German law was thus applicable to the child-raising periods completed in France. [14]

41. A similar line of reasoning was followed in *Kauer*. In that case, the applicant was an Austrian national whose three children were born in Austria. She had moved to Belgium in 1970 where she had looked after her children full time. She had resumed work in September 1975 upon her return to Austria. The Court held that it was clear from *Elsen* that the fact that a person such as Ms Kauer had worked in only one Member State (Austria) and was subject to the legislation of that Member State at the time when her children were born allowed a 'sufficiently close link' to be established between those child-raising periods and the periods of insurance completed by virtue of the pursuit of a gainful occupation in that Member State. [15] Thus, in relation to step 1, described in point 38 above, the Court held that Austrian law was applicable to the child-raising periods which Ms Kauer completed in Belgium.

42. I am of the view that, in both cases, the Court based its conclusion on step 1, that is, that the legislation applicable to the child-raising periods in question was that of Member State A (the Member State of employment), on the fact that the applicant was either in gainful occupation in that Member State or otherwise subject to the latter's legislation, as a consequence of her past gainful occupation, *at the time* when the child was born and the child-raising period(s) began running. In my view, it was that particular fact which allowed the Court to conclude that there was a 'close link' (*Elsen*) or 'sufficiently close link' (*Kauer*) between relevant qualifying periods completed in Member State A and the child-raising periods completed in Member State B. [16]

43. A different factual scenario arose in *Reichel-Albert*. In that case, the parent who was raising the child had not been subject to the legislation of Member State A at the time of the birth of the child (or even immediately before that time). The appellant in the main proceedings was a German national who, like the applicants in *Elsen* and *Kauer*, had pursued a gainful activity in only one Member State (namely, Germany) before she relocated to another Member State (Belgium). However, unlike the applicants in both those cases, she had resided for a few months in Belgium before her first child was born. She then stayed home with her children in Belgium for several years, during which time she did not work, before returning and making a living in Germany. [17]

44. Building upon the 'sufficiently close link' test that it had applied in *Elsen* and *Kauer*, the Court found that German legislation was applicable to Ms Reichel-Albert's situation, even though the periods during which she had been subject to that legislation as a result of her gainful activity in Germany did not immediately precede the moment when her first child was born in Belgium. Two elements, in particular, seem to me to have influenced the Court's conclusion. First, Ms Reichel-Albert had worked and contributed in only one Member State (Germany), both before and after temporarily transferring her place of residence to another Member State

[14] Ibid., paragraph 26.

[15] See *Kauer*, paragraph 32 et seq.

[16] It may be interesting to note that, in *Kauer*, the applicant had in fact stopped working and had become unemployed in Austria some time before she gave birth to her children. In my view, what led the Court to conclude that Ms Kauer nevertheless remained subject to the legislation of that Member State during the periods in which she raised her children in Belgium was that she did not settle in that Member State until after the birth of her youngest child.

[17] The judgment in *Reichel-Albert* came after the entry into force of Article 44(2) of Regulation No 987/2009, but the Court found that it was the previous instrument on the coordination of social security systems, namely Regulation No 1408/71, rather than Regulations No 883/2004 and No 987/2009, that applied *ratione temporis* to the facts at issue.

(Belgium) where she had never worked.[18] Second, Ms Reichel-Albert had moved to Belgium solely on family-related grounds[19] and directly from Germany, where she had been employed up until the month prior to her move.

45. As I have indicated in point 38 above, all three of the cases above took place in the context of the application of Regulation No 1408/71. That regulation listed, in its Article 13(2), general rules designed to solve conflict-of-law issues in the area of social security, but it did not contain any provision on child-raising periods. Faced with that legislative lacuna, the Court established (in step 1, described in point 38 above) that child-raising periods completed in a Member State other than the one in which the person had worked would continue to be governed by the law of that Member State so long as such periods were, in essence, 'sufficiently closely linked' to relevant 'qualifying' periods of gainful occupation completed in that territory.

46. It was only upon completion of that assessment that the Court turned to relevant Treaty provisions on the freedom of movement of workers and citizens and grappled with the issue of compatibility with EU primary law (step 2). To give but one example, in *Reichel-Albert*, it was only after concluding that there was a 'sufficiently close link' between the disputed foreign child-raising periods and the relevant qualifying periods of gainful activity completed by the applicant so that German law *applied* to such foreign child-raising periods (step 1), that the Court found that same legislation to be incompatible with Article 21 TFEU (step 2) given that, in its view, Ms Reichel-Albert would, although having never been employed or self-employed in Belgium, receive a treatment less favourable than that which she would have enjoyed had she not exercised her freedom to move pursuant to the Treaties.[20]

47. Having briefly outlined the Court's case-law under Regulation No 1408/71, I shall now turn to the current situation and explain why, in my view, the 'sufficiently close link' test is not relevant to proceedings such as those in the present case, to which Article 44(2) of Regulation No 987/2009 applies.

2. The current situation: Article 44(2) of Regulation No 987/2009 and why the 'sufficiently close link' test is no longer relevant

48. Given the chronology of the facts at issue in the main proceedings, as outlined in points 16 to 20 above, and the date of the entry into force of Regulation No 987/2009, it is clear to me that that regulation applies *ratione temporis* to the present case.[21] Neither the referring court nor the parties to the main proceedings and interested parties dispute this point. Thus, the present case differs from *Elsen*, *Kauer* and *Reichel-Albert*, at least to the extent that, in those cases, the proceedings were altogether excluded from that regulation's temporal scope.[22]

49. The parties to the main proceedings and the interested parties also agree that, in the context of the main proceedings, the Appellant cannot rely on Article 44(2) of Regulation No 987/2009 because she was neither employed nor self-employed in Austria on the date when, pursuant to

[18] See *Reichel-Albert*, paragraph 35.

[19] Ibid.

[20] Ibid., paragraphs 40 to 42.

[21] As the Court recalled in *Reichel-Albert* (in paragraphs 25 and 26), by Article 97 of Regulation No 987/2009, the European Union legislature fixed the entry into force of that regulation at 1 May 2010. In the context of the main proceedings, the decision challenged by the Appellant was taken by the PVA on 29 December 2017, well after the entry into force of Regulation No 987/2009. That same regulation was already applicable when the Appellant applied to the PVA for an old-age pension.

[22] See, for example, *Reichel-Albert*, paragraphs 27 and 28.

Austrian law, the disputed child-raising periods would begin to be taken into account. As indicated in point 32 above, the third requirement listed in Article 44(2) of Regulation No 987/2009 is that the person can still be considered to be 'pursuing' a gainful activity in Member State A (Austria) on the date when, under that Member State's legislation, the disputed child-raising period would begin to be taken into account for the child concerned. Under Austrian law, that date would be 1 January 1988.[23] At that time, the Appellant had already been away from Austria for over a year and had undertaken further studies in the United Kingdom before settling down in Belgium, where both her children were born.

50. The referring court notes that the facts in the main proceedings are similar to those in *Reichel-Albert* since, in that case too, the period of time during which the applicant had been subject to the legislation of Member State A because of her gainful occupation in that Member State did not immediately precede the birth of her children. It would therefore like to know whether the judicial solution in *Reichel-Albert* could apply to the case at hand. It considers that, if applicable, the Appellant would be entitled to have the child-raising periods that she completed in Belgium and Hungary taken into account.

51. I note that two different lines of argument were set out before the Court in that regard.

52. On the one hand, the Appellant, supported on this point by the Commission and the Czech Government, contends that the Court is bound by the *ratio decidendi* in *Reichel-Albert* so that, in factually similar cases, child-raising periods completed abroad which do not *materially* come within the ambit of Article 44(2) of Regulation No 987/2009 (even though they are within the *temporal* scope of that regulation) would still have to be decided on the basis of Article 21 TFEU and of the 'sufficiently close link' test. Otherwise, Article 44(2) of Regulation No 987/2009 would cause applicants for an old-age pension to be treated less favourably than they would have been prior to the entry into force of that regulation. In the context of the main proceedings, the Appellant would find herself financially worse off simply because she decided to raise her children in a Member State other than Austria. Indeed, if she had stayed in Austria, Austrian legislation would require the PVA to take such periods into account in their entirety.

53. On the other hand, the PVA and the Austrian and Spanish Governments are of the view, in essence, that the judicial test in *Reichel-Albert*, which was based on the existence of a 'close link' or 'sufficiently close link' between the periods of gainful activity completed in Member State A and the child-raising periods completed in Member State B, has been superseded by the criteria set out in Article 44(2) of Regulation No 987/2009, so that the Court can no longer apply that test.

54. I agree with that latter point of view.

55. First, I would like to start by pointing out that, in so far as the taking into account of foreign child-raising periods is concerned, what Article 21 TFEU requires, pursuant to the Court's case-law set out above, is for the Member State whose legislation is found to be applicable to a particular situation where a person has exercised his or her freedom of movement and decided to raise his or her child(ren) in another Member State, to treat that situation as though it has been completed on its territory.[24]

[23] The PVA explained at the hearing that, pursuant to Paragraph 231(3) of the ASVG, child-raising periods begin to be taken into account starting from the first full civil month after the date at which the conditions laid down in Paragraph 227a or 228a of the legislation in question are met. It appears from the case file that the Appellant gave birth to her first child in December 1987.

[24] Certainly, that much is clear from the judgments in *Elsen* (paragraphs 33 to 36), *Kauer* (paragraphs 43 and 44) and *Reichel-Albert* (paragraphs 38 to 44).

56. In my view, that rule remains unchanged under Article 44(2) of Regulation No 987/2009. The conditions listed in that provision limit *only* the types of situations in which the legislation of Member State A may be found to be applicable to a particular foreign child-raising situation [25], but they in no way affect the obligations that are incumbent upon Member State A, if that Member State's law is found to be applicable to such a situation. As such, one must not lose sight of the fact that, while the two steps described in point 38 above are now set out in a single legislative provision, the obligations that derive from that provision continue to be two-fold: (i) Member State A must apply its legislation to the child-raising periods completed in Member State B, if the conditions listed in Article 44(2) of Regulation No 987/2009 are satisfied, and (ii) where that is the case and the legislation of Member State A is applicable, then that Member State must treat such periods as though they had been completed on its territory.

57. Those remarks enable me to pinpoint what the real problem is in the present case. It is not that the Appellant could be treated less favourably pursuant to Austrian legislation simply because she lived in two other Member States during the time that she raised her children (clearly, that is not an option under Article 44(2) of Regulation No 987/2009). [26] Rather, it is that the conditions which limit the *applicability* of Austrian legislation to her situation are defined more narrowly in that provision than in the judicial test adopted in *Reichel-Albert*.

58. Second, it is clear to me that, if EU law placed more extensive obligations on Member States to apply their legislation to foreign child-raising periods than those already imposed by Article 44(2) of Regulation No 987/2009, then the requirements listed in that provision would amount to just one of the sets of circumstances under which Member State A would be required to apply its legislation to child-raising periods completed in Member State B.

59. I must admit that I would be more inclined to adopt such a reading of Article 44(2) of Regulation No 987/2009 if the *wording* of that provision were *at least to some extent open-ended or ambiguous*. Yet, as I read it, that provision does not provide so much as a hint to the fact that EU law could impose, on the Member State in which the old-age pension applicant was employed or self-employed, any such further obligations. As I indicated in point 45 above, the 'sufficiently close link' test was formulated by the Court in relation to the general criteria set out in Regulation No 1408/71, rather than Article 21 TFEU itself (which, in *Elsen*, *Kauer* and *Reichel-Albert*, served as a basis for the obligation upon Member State A, in step 2, to treat foreign child-raising periods as though they had been completed on its own territory). [27] Given that that regulation has now been repealed and replaced by Regulations No 883/2004 and No 987/2009, whose Article 44(2) specifically deals with that particular issue, it seems only logical to conclude that the rules

[25] In comparison to the situations which would have been covered under the 'sufficiently close link' test which the Court relied upon in the context of the application of Regulation No 1408/71.

[26] In that respect, I fully share the Commission's view that Regulations No 883/2004 and No 987/2009 were adopted in order to set out specific rules of competence to further the freedom of movement of EU citizens and not to restrict it. That is certainly true and, in fact, the Court has consistently pointed out that it is in order to ensure the free movement of employed and self-employed persons within the European Union, while upholding the principle of equal treatment of those persons under the various measures of national legislation, that Regulation No 1408/71, and then Regulation No 883/2004, have established a system of coordination concerning, inter alia, the determination of the legislation applicable to them (see judgment of 23 January 2019, *Zyla* (C-272/17, EU:C:2019:49, paragraph 37 and the case-law cited)).

[27] Of course, that is not to say that the conditions pursuant to which a Member State's legislation becomes applicable to a particular social security cross-border case can, in and of themselves, impose undue restrictions on the freedom of movement of EU citizens. Nevertheless, one must not lose sight of the fact that Article 21 TFEU is based on the logic that, as its first paragraph makes clear, 'every citizen of the Union shall have the right to move and reside freely within the territory of the Member States, *subject to the limitations and conditions laid down in the Treaties and by the measures adopted to give them effect*' (my emphasis). While that provision is not an open invitation for the legislature to interfere with the basic tenets of that right, it is rather clear to me that, in the area of social security, the legislature may very well, among other things, redefine the legal criteria pursuant to which a person who has exercised his or her freedom of movement is entitled to claim that the law of his or her Member State of origin remains applicable to him or her.

contained in that provision have eclipsed any of the Court's prior attempts at defining the conditions pursuant to which Member State A's legislation may become applicable to child-raising periods completed in Member State B.

60. Of course, that is not, and cannot be, the end of the story, for one ought also to consider the legislature's intent behind Article 44(2) of Regulation No 987/2009 and consider whether the circumstances surrounding its *adoption* support that interpretation. In that regard, I note that the drafting history of Article 44(2) of Regulation No 987/2009 reveals that it was introduced with a view not only to reflect the Court's judgments in *Elsen* and *Kauer*, but also to *define* their scope.[28] In my view, one can therefore readily assume that the EU legislature made a *conscious choice* not to refer to the 'close link' or 'sufficiently close link' test formulated by the Court, and opted instead for the more specific requirement that the person still be subject to the legislation of Member State A on the ground of his or her activity as an employed or self-employed person in that Member State, at the date when the child-raising period would start to be taken into account under that same Member State's legislation.[29]

61. I would also add that the EU legislature seems, in a host of other provisions of Regulations No 883/2004 and No 987/2009, not only to have reflected, but also to have clarified (and, in some instances, perhaps even departed from) the Court's case-law that was developed in the context of the application of Regulation No 1408/71.[30] That much is, I would say, apparent from recital 3 of Regulation No 883/2004, which confirms the legislature's wish to modernise and simplify the provisions of that former regulation, given that the latter had been made more complex and lengthy following numerous amendments and updates in order to take account, inter alia, of various judgments of the Court.

62. Since Regulation No 987/2009 postdates *Elsen* and *Kauer* (albeit not *Reichel-Albert*), the legislature could have drafted Article 44(2) of that regulation, had it wished to do so, in such a way as to integrate fully and clearly the interpretation given by the Court in the first two of those judgments. However, it chose not to do so. In those circumstances, it must be held that the absence, in Article 44(2) of Regulation No 987/2009, of an express reference to the 'close link' or 'sufficiently close link' test indicates that the legislature deliberately intended to restrict the application of the *ratio decidendi* of *Elsen* and *Kauer* and provided only a possibility for the legislation of Member State A to apply to child-raising periods completed in Member State B pursuant to the conditions expressly listed in that provision.

63. I agree with the Commission that the legislature could not have anticipated, when it adopted Article 44(2) of Regulation No 987/2009, that the Court would, in *Reichel-Albert*, expand the scope of the 'sufficiently close link' test. Perhaps it would have worded the terms of that provision differently had that judgment been delivered before that provision was adopted.

[28] See recitals 12 and 14 of Regulation No 987/2009. See also recital 13 of the Position of the European Parliament adopted at first reading on 9 July 2008 with a view to the adoption of the regulation (P6_TC1-COD(2006)0006).

[29] In the initial Commission Proposal, Article 44 seemed to be departing even more from the judicial solution in *Elsen* and *Kauer*, as it was drafted in the following terms: 'without prejudice to the competence of the Member State determined in accordance with the provisions of Title II of Regulation (EC) No 883/2004, the institution of the Member State in which the beneficiary of the pension *has resided for the longest period during the twelve months following the birth of the child* must take into account the child's periods of education in another Member State, provided that the legislation of another Member State is not applicable to the person concerned through the pursuit of an activity as an employed or self-employed person' (my emphasis) (see Proposal for a Regulation of the European Parliament and of the Council laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (COM(2006) 16 final).

[30] See, for example, the reasoning adopted by the Court in its judgment of 11 April 2013, *Jeltes and Others* (C-443/11, EU:C:2013:224, paragraph 32). That case concerned the interpretation of Article 65 of Regulation No 883/2004 and the question of whether that provision was intended to reflect or depart from the Court's case-law on the previously applicable provision (namely, Article 71 of Regulation No 1408/71).

However, it is not for the Court to speculate on that matter. Given that the legislature has expressly dealt with the issue of the taking into account of foreign child-raising periods in Article 44(2) of Regulation No 987/2009, any change to the conditions under which Member State A is required to apply its legislation to such periods must, in my view, from then on, also be made at the initiative of the legislature.

64. Third, a closer inspection of the *purpose* of Regulations No 883/2004 and No 987/2009 strengthens my belief that one ought to resist the temptation of supplementing the obligations now contained in Article 44(2) of the latter regulation by a set of unwritten case-law-based rules. As is clear from Article 11(1) of Regulation No 883/2004, one of the core principles of the system coordinating national social security schemes is that the legislation of a *single* Member State should be applicable. [31] Within that context, Article 44(2) of Regulation No 987/2009 carves out an exception to the rules of competence provided for in Title II of Regulation No 883/2004 to make a Member State that is no longer competent under such rules responsible for taking into account child-raising periods completed in other Member States. [32]

65. In my view, the limits to such an exception must be drawn with sufficient clarity. As the Court has consistently held, the provisions of Title II of Regulation No 883/2004 constitute a *complete* and uniform system of conflict rules which are intended, on the one hand, to ensure that the persons covered by that regulation are not left without social security cover by virtue of the fact that no legislation is applicable to them and, on the other hand, to prevent the simultaneous application of a number of national legislative systems and the complications that may ensue. [33] Article 44(2) of Regulation No 987/2009 is a somewhat unique provision because the rule of competence contained therein – which requires Member State A to apply its legislation to foreign child-raising periods – is without prejudice to the fact that the criteria set out in Title II of Regulation No 883/2004 may perfectly well designate Member State B as the Member State whose legislation is otherwise applicable to the person concerned. Consequently, it is important that the competent authorities of Member State A be able to understand *fully* the conditions pursuant to which its legislation becomes applicable to child-raising periods completed by someone who, at the relevant time, was neither 'employed' nor 'self-employed' in that Member State (Article 11(3)(a) of Regulation No 883/2004), nor resident in its territory (Article 11(3)(e) of that regulation). If any doubt could exist as to such obligations, then the effectiveness ('*effet utile*') of Article 44(2) would necessarily be compromised.

66. Unlike the Appellant and the Commission, I take all the foregoing considerations to mean that, within the context of the application of Article 44(2) of Regulation No 987/2009, a Member State is not required to apply its legislation to child-raising periods completed in one or more other Member States on the mere ground that such periods are 'closely linked' to qualifying periods previously completed on its territory. It must do so only when all the conditions listed in that provision, which I have recalled in point 32 above, are satisfied.

[31] For a general explanation of the conflict-of-law rules in Regulations No 883/2004 and No 987/2009, see Lhernould, J.P., 'New rules on conflicts: regulations 883/2004 and 987/2009', *ERA Forum*, Vol. 12, 2011, pp. 25 to 38.

[32] See Jorens, Y., and Van Overmeiren, F., 'General Principles of Coordination in Regulation 883/2004', *European Journal of Social Security*, Vol. 11, 2009, p. 66.

[33] See, in that sense, judgment of 5 March 2020, *Pensionsversicherungsanstalt (Rehabilitation benefit)* (C-135/19, EU:C:2020:177, paragraph 46). It has been argued that the coordination system in Title II of Regulation No 883/2004 has an *exclusive effect* since no legislation can be applicable other than the one indicated therein. In that regard, see Jorens, Y., and Van Overmeiren, F., 'General Principles of Coordination in Regulation 883/2004', *European Journal of Social Security*, Vol. 11, 2009, p. 72.

67. By way of final remark, I would like to emphasise the fact that, in my view, the economic consequences that would follow, in the context of the main proceedings, from applying Austrian, Belgian or Hungarian law to the disputed child-raising periods should have no bearing on the answer to be given to the first question. Whether or not the Appellant would find herself financially worse off because the substantive law of Member State B, rather than that of Member State A, would apply to her situation cannot, I think, influence the Court's assessment. The law designated as being applicable to foreign child-raising periods may be beneficial to the person concerned in some cases, while detrimental in others.

68. In that regard, I recall that EU primary law does not guarantee to a worker that moving to a Member State other than his or her Member State of origin will not have any implications in terms of his or her social security situation, since, given the disparities between the Member States' social security schemes and legislation, such a move may be more or less advantageous for the person concerned. [34] Within that context, Regulations No 883/2004 and No 987/2009 are not intended to harmonise or even to align, but merely to establish a system of coordination concerning, inter alia, the determination of the legislation applicable to employed persons who make use, under various circumstances, of their right to freedom of movement. [35] The fact that the effect of exercising the freedom of movement may to varying degrees be favourable or unfavourable to the person concerned, depending on the circumstances, is a direct result of the resolution to maintain the difference between the laws of the Member States. [36]

3. The Appellant could not legitimately expect that her situation would be governed by the Court's earlier case-law

69. Having provided the reasons why I do not believe that the judicial solution in *Reichel-Albert* can be applied to the present case, I wish to address, for the sake of completeness, the Appellant's argument that she legitimately expected Austrian law to apply to the disputed child-raising periods, given that she completed such periods long before Regulation No 987/2009 came into force and would have previously satisfied the 'close link' or 'sufficiently close link' test set out in *Elsen* and *Kauer*.

70. In response to that argument, the PVA and the Austrian Government argue that, in the context of the main proceedings, the Appellant could not harbour such legitimate expectations. First, at the time when she moved to Belgium and Hungary, Austria was not a Member State and the judgments in *Kauer* and *Elsen* had not yet been delivered. Second, the Appellant did not acquire any right with regard to such periods until she requested the grant of an old-age pension in 2017.

71. I agree with the PVA and the Austrian Government that, at the time when the Appellant relocated to Belgium in 1987 and then Hungary in 1991, she could not have possibly thought that she was exercising her right to freedom of movement pursuant to Article 21 TFEU and that, as a result, she may be entitled to have the periods that she completed in those other Member States

[34] See judgment of 23 January 2019, *Zyla* (C-272/17, EU:C:2019:49, paragraph 45, and the case-law cited).

[35] See recital 1 of Regulation No 883/2004. The system of conflict rules established therein has the effect of divesting the legislature of each Member State *only* of the power to determine at its discretion the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned (see judgment of 23 January 2019, *Zyla* (C-272/17, EU:C:2019:49, paragraph 38 and the case-law cited)). In accordance with Article 48 TFEU, it otherwise leaves intact the competence of the Member States in this area, provided that the latter act in compliance with EU law, and in particular in accordance with the purpose of those regulations and the TFEU provisions relating to the free movement of persons.

[36] See, similarly, Opinion of Advocate General Jääskinen in *Reichel-Albert* (C-522/10, EU:C:2012:114, points 43, 45 and 46).

treated by the PVA as though they had been completed on the Austrian territory. By virtue of Article 2 of the Act of Accession relating to the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded,[37] the provisions of the original Treaties and the acts adopted by the institutions before accession did not become binding on Austria until 1 January 1995.

72. However, if one were to stop the analysis there, one would be disregarding the fact that, in so far as pension cases are concerned, the relevant date in order to determine which rules are applicable *ratione temporis* is the date on which the person applies for an old-age pension. In the case of the Appellant, that 'key' date is 11 October 2017. At that point, Austria was indeed part of the European Union.

73. It is clear from *Kauer* that, in such conditions, the determination of the Appellant's pension entitlement, *even on the basis of periods of insurance completed before Austria's accession*, has to be carried out by the Austrian authorities in accordance with EU law and, in particular, in accordance with the provisions of the Treaty relating to the free movement of workers or the freedom of every EU citizen to move and reside in the territory of the Member States.[38] The case in the main proceedings does not concern the recognition of rights allegedly acquired under EU law before Austria's accession, but rather the question of whether the PVA's refusal, in December 2017, to take into account the disputed child-raising periods occurred in breach of the EU rules which had, *at that time*, become binding upon Austria.[39]

74. Having clarified that point, I am of the view, contrary to what the Appellant argues, that she could not legitimately expect that the issue of whether Austrian legislation *applies* to such periods would be resolved with regard to the 'close link' or 'sufficiently close link' test set out in *Elsen* and *Kauer* (in relation to the criteria contained in Regulation No 1408/71), rather than the rules contained in Regulations No 883/2004 and No 987/2009.

75. In that respect, I note that the Court has consistently held that the principle of legitimate expectations cannot be extended to the point of 'generally preventing a new rule from applying to the future effects of situations which arose under the earlier rule'.[40] In order to ensure the protection of legitimate expectations, the substantive rules of EU law must, however, be

37 OJ 1994 C 241, p. 9, and OJ 1995 L 1, p. 1.

38 See *Kauer*, paragraph 45. I recall that, in that case, the Court concluded that the national legislation at issue did introduce a difference in treatment because it made the taking into account of child-raising periods spent in another Member State (Belgium) subject to receipt of cash maternity allowance or equivalent allowances under federal Austrian legislation. As Advocate General Sharpston argued in another case, the Court was implicitly prepared to regard Ms Kauer as having exercised EU rights to free movement, even though the 'movement' in question took place before Austria's accession to the European Union (see Opinion in *Wieland and Rothwangl* (C-465/14, EU:C:2016:77, points 50 and 51)).

39 See, by analogy, judgment of 30 November 2000, *Österreichischer Gewerkschaftsbund* (C-195/98, EU:C:2000:655, paragraphs 53 and 54). In his Opinion in that case (EU:C:2000:50, point 147), Advocate General Jacobs observed, in my view rightfully, that a different finding would put migrant workers who want to work in a 'new Member State' or to leave that State in order to work in an 'old Member State' at an illogical disadvantage compared to workers moving within the area composed of the 'old Member States'.

40 See, for example, judgments of 16 May 1979, *Tomadini* (84/78, EU:C:1979:129, paragraph 21), and of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647, paragraph 49 and the case-law cited).

interpreted as applying to 'situations existing before their entry into force only in so far as it clearly follows from their terms, their objectives or their general scheme that such effect must be given to them'. [41]

76. In the present case, the date of entry into force of Regulations No 883/2004 and No 987/2009 (1 May 2010) does not mean that, for the purpose of determining the Appellant's old-age pension in the main proceedings, the disputed child-raising periods must be governed by the previously applicable regulation, namely Regulation No 1408/71. That much is clear from Article 87(2) of Regulation No 883/2004, which also applies to Regulation No 987/2009 by virtue of its Article 93, and provides, in essence, that any relevant period completed prior to the entry into force of Regulation No 883/2004 in the Member State concerned shall be taken into consideration for the determination of the rights acquired under that instrument. [42]

77. In my view, it clearly follows from that provision that, in the main proceedings, the Appellant could not legitimately expect that her past situation would be governed by Regulation No 1408/71 and the case-law adopted in relation thereto. Consequently, while the disputed child-raising periods arose prior to the entry into force of Regulation No 987/2009, the question of which Member State's legislation ought to apply to such periods must be resolved with regard *solely* to Article 44(2) of that regulation.

4. Conclusion on the first question

78. In the light of the above considerations, I propose that the Court answer the first question as follows: in a situation where Regulation No 987/2009 applies *ratione temporis*, EU law does not require a Member State on whose territory a person has been employed or self-employed to take into account a child-raising period completed by that same person in another Member State as if the child had been raised in its own territory unless all the conditions laid down in Article 44(2) of Regulation No 987/2009 are met in the situation at issue.

79. If, contrary to what I propose, the Court were to find that the judicial solution in *Reichel-Albert* remains applicable in the context of the main proceedings so that Austria must apply its legislation to child-raising periods completed in other Member States even where they do not fall squarely within the ambit of Article 44(2) of Regulation No 987/2009, I would add that, in my view, that is possible only where two requirements are met.

80. First, as I indicated in the previous sections of this Opinion, there would have to be a 'sufficiently close' link between the child-raising periods completed in Member State B and the qualifying periods completed by the applicant for an old-age pension in Member State A. As the Commission rightly suggests, no such link may exist unless the applicant establishes, at a minimum, that Member State A was his or her last Member State of employment before he or she started raising his or her child(ren). Yet, even where that is the case, one must still assess whether such a link is 'sufficiently close'.

[41] See judgment of 6 October 2015, *Commission* v *Andersen* (C-303/13 P, EU:C:2015:647, paragraph 50). See also the summary of that case-law by Advocate General Bobek in his Opinion in *E.B.* (C-258/17, EU:C:2018:663, point 47). I note, in passing, that, in point 48 of his Opinion, he found that the same approach is also reflected in the context of an accession of a new Member State to the European Union, with regard to the national application of (new) EU rules: past facts (that is, facts pre-dating accession) may be taken into account if they are relevant and need to be (freshly) assessed in the process of the application of the new law(s) post-accession.

[42] On the other hand, Article 87(5) of Regulation No 883/2004 provides that 'the rights of a person to whom a pension was *provided* prior to the date of application of this Regulation in a Member State may, *at the request of the person concerned*, be reviewed, taking into account this Regulation' (my emphasis).

81. On that point, the PVA remarked, in my view correctly, that the Appellant's situation in the main proceedings and that of Ms Reichel-Albert in the eponymous case are, to a certain extent, different. In *Reichel-Albert*, the Court appeared to give significant weight to the fact that Ms Reichel-Albert had, at the time of the birth of her first child, temporarily stopped working and, *solely on family related grounds*, established her place of residence in Belgium.[43] In the context of the main proceedings, the Appellant's departure from Austria in 1987 was motivated by the prospect of pursuing studies in the United Kingdom. Arguably, that transitional period of further education makes the link between the Appellant's period of insurance in Austria prior to the birth of her children and the disputed child-raising periods in Belgium and Hungary more tenuous than in *Reichel-Albert*.[44]

82. Second, the applicant for an old-age pension would also need to demonstrate that, had he or she stayed in Member State A (in this instance, Austria), the time dedicated to raising his or her children would have been taken into account. In other words, the applicant would have to show that, because he or she moved and changed residence to another Member State, he or she is now effectively in a worse position than if he or she had simply remained in Member State A.

B. The second question

83. The second question builds upon the answer that the Court is to give to the first question. By that question, the referring court requests guidance on whether Article 44(2) of Regulation No 987/2009 requires Member State A to apply its legislation only in situations where there is no legislation on child-raising periods completed in Member State B or also in those cases where such legislation does exist in Member State B but the time dedicated to raising children is not taken into account *in concreto* by that Member State. The referring court asks that question with regard, in particular, to the Opinion of Advocate General Jääskinen in *Reichel-Albert*.[45] In that case, Advocate General Jääskinen defended the view that Article 44(2) will not apply where Member State B provides for the *possibility* of taking such periods into account. He considered the fact that, in practice, the person concerned does not benefit from that advantage because of his or her personal situation to be immaterial.[46]

84. I do not see any reason why the Court should arrive at a different finding in the present case. As set out in point 56 above, Article 44(2) of Regulation No 987/2009 contains a two-fold obligation. First, Member State A must apply its legislation to the child-raising periods completed in Member State B if the conditions listed in that provision are satisfied. Those conditions include the requirement that the child-raising periods are not taken into account under the legislation of Member State B. Second, if the legislation of Member State A is applicable, then that Member State must treat such periods as though they had been completed on its territory.

43 See *Reichel-Albert*, paragraphs 35 and 45, as well as the operative part of the judgment.

44 I find that argument to be more convincing than the one defended by the Spanish Government. According to that government, the distinguishing factor between *Reichel-Albert* and the present case is that, unlike the Appellant in the main proceedings, Ms Reichel-Albert continued to receive unemployment benefits after she stopped working in Germany. I do not think that that fact alone ought to make a difference in how the two situations relate to one another. It is true that, in *Reichel-Albert*, the applicant was unemployed as of 30 June 1980 and drew unemployment benefit from Germany until October 1980, whereas she settled in Belgium in July 1980 (while she was still receiving that benefit). Nonetheless, that does not change the fact that she did not start raising her family until 25 May 1981, several months after she had stopped receiving that benefit.

45 C-522/10, EU:C:2012:114.

46 See point 67 of that Opinion.

85. I admit that the terms in Article 44(2) of Regulation No 987/2009 are somewhat ambiguous since the requirement relating to the taking into account of the disputed child-raising period by Member State B is formulated as follows: 'where, under the legislation of [Member State B], no child-raising period is taken into account …'. As the referring court explains, this could mean either that such period is not taken into account *in principle* by Member State B because the latter has no legislation dealing with child-raising periods or *in concreto* because, in a given case, the person concerned was not able to have such period recognised under the legislation of Member State B.

86. There are, however, two reasons that convince me not to follow that second interpretation.

87. First, it would be too cumbersome and impractical to oblige the authorities of Member State A to proceed to an assessment of the merits of the person's claim under the legislation of another Member State (Member State B) in order to determine whether the legislation of Member State A is applicable to that person's situation. Second, such a reading of the conditions laid down in Article 44(2) of Regulation No 987/2009 would potentially lead to situations where a person could (i) claim before the authorities of Member State B that he or she is entitled to have the child-raising periods completed in that Member State taken into account pursuant to that Member State's legislation and (ii) if such a claim fails, bring his or her case before the competent authorities of Member State A and argue that, because his or her claim before the authorities of Member State B was unsuccessful, Article 44(2) of that regulation means that the legislation of Member State A may be applicable to his or her situation.

88. In my view, that provision was *not* adopted so that old-age pension applicants may try their luck before the competent authorities of two different Member States with regard to the taking into account of a single child-raising period. As indicated in point 64 above, Article 44(2) of Regulation No 987/2009 carves out an exception to the rules of competence provided for in Title II of Regulation No 883/2004 to make a Member State that is no longer competent under such rules (Member State A) responsible for taking into account child-raising periods completed in another Member State (Member State B). The aim of that provision is not for the legislation of both Member State A and Member State B to end up being applicable to the same child-raising period, but rather that, in a situation where Member State B has no legislation providing *generally* for the taking into account of child-raising periods, Member State A may be required to apply its legislation to the particular situation at hand.

89. It follows from the above that Article 44(2) of Regulation No 987/2009 must, in my view, be interpreted as meaning that Member State A is not required to apply its legislation to a particular child-raising period in circumstances where Member State B (the competent Member State pursuant to Title II of Regulation No 883/2004) provides, *in principle*, for such period to be taken into account. Thus, if Belgium and Hungary had (in October 2017) a general rule or provision in place allowing for the time devoted to raising children to be taken into account – which is for the referring court to determine – then, in the context of the main proceedings, the PVA would *not* be required to apply Austrian legislation to the disputed child-raising periods.

V. Conclusion

90. In the light of the foregoing considerations, I propose that the Court answer the questions referred for a preliminary ruling by the Oberster Gerichtshof (Supreme Court, Austria) as follows:

– In a situation where Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems applies *ratione temporis*, EU law does not require a Member State on whose territory a person has been employed or self-employed to take into account a child-raising period completed by that same person in another Member State as if the child had been raised in its own territory unless all the conditions laid down in Article 44(2) of that regulation are met in the situation at issue.

– The fact that such period is taken into account by law but is not taken into account in practice, in the light of the situation at issue, in the Member State which is competent under Title II of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2009 on the coordination of social security systems, does not in itself affect the interpretation of Article 44(2) of Regulation No 987/2009.