JUDGMENT OF THE COURT (Second Chamber)
19 March 1992 *

In Case C-188/90,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bayerisches Landessozialgericht (Higher Social Court of Bavaria) for a preliminary ruling in the proceedings pending before that court between

Mario Doriguzzi-Zordanin and Marzio Doriguzzi-Zordanin

and

Landesversicherungsanstalt Schwaben (Regional Insurance Office, Swabia)

on the interpretation of Article 78 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 consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6),

THE COURT (Second Chamber),

composed of: F. A. Schockweiler, President of Chamber, G. F. Mancini and J. L. Murray, Judges,

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: German.

after considering the written observations submitted on behalf of:

Mario and Marzio Doriguzzi-Zordanin, by Luciano Fazi, Sozialsekretär of the Patronato ACLI, Augsburg,

the Landesversicherungsanstalt Schwaben, by Mr Schachtner, Erster Direktor, Augsburg,

the Belgian Government, by P. Busquin, Minister for Social Affairs, acting as Agent,

the Commission of the European Communities, by Maria Patakia and Bernd Langeheine, members of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mario and Marzio Doriguzzi-Zordanin, the Landesversicherungsanstalt Schwaben, represented by Michael Kohnle, Regierungsdirektor, and the Commission, at the hearing on 14 November 1991,

after hearing the Opinion of the Advocate General at the sitting on 14 January 1992,

gives the following

Judgment

1 By order of 17 May 1990, which was received at the Court on 11 June 1990, the Bayerisches Landessozialgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of Article 78 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 consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6).

2 Those questions were raised in the course of proceedings between the children of a migrant worker (hereinafter referred to as 'the plaintiffs') and the Landesversicherungsanstalt Schwaben (hereinafter referred to as 'the LVA') on the calculation of the amount of benefit supplement payable to the plaintiffs.

3 The plaintiffs are the minor children of Giancarlo Doriguzzi-Zordanin, an employed person who died on 29 August 1983 and had completed periods of insurance in both Germany and Italy. They have always been resident in Italy.

4 Since 1 September 1983 the Italian insurance institution, Istituto Nazionale della Previdenza Sociale ('the INPS'), has been paying the plaintiffs an orphan's pension on the basis of the periods of insurance completed by their late father in that Member State. The monthly amount varied between LIT 59 710 and LIT 73 960 per child, with an additional fixed monthly sum of LIT 19 760 per child as a family supplement.

5 In a decision of 3 September 1985 the LVA, being of the opinion that the INPS was the sole competent institution, refused to award a supplement on top of the benefits paid by the INPS. On 16 July 1986 the plaintiffs challenged that decision in the Sozialgericht (Social Court) Augsburg.

6 On 7 May 1987 the LVA reversed its earlier decision and awarded the plaintiffs a supplement for the period from 1 September 1983 to 31 December 1985. That supplement was equivalent to the difference between the amount of the orphan's pension which would theoretically have been payable by the competent authority in Germany, on the basis of the periods of insurance completed in that State, and the total benefit, including the family supplement, paid in Italy by the INPS.

7 The plaintiffs considered that the family supplement awarded by the INPS did not constitute part of the orphan's pension but was an independent benefit, and argued before the Sozialgericht Augsburg that the supplement paid by the LVA ought to

be calculated without taking the said family supplement into account. By a decision of 19 October 1989 the Sozialgericht Augsburg dismissed their application, and the plaintiffs appealed against the dismissal to the Bayerisches Landessozialgericht.

8 The Landessozialgericht stayed the proceedings pending a preliminary ruling by the Court of Justice on the following two questions:

'1. What benefits paid by the Italian insurance institution are taken into account in calculating the supplement to the orphan's pension payable by the German insurance institution?

2. In particular, are the monthly family supplements of LIT 19 760 per child paid by the Italian insurance institution to be included?'

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

10 In the two questions submitted for a preliminary ruling, the national court essentially wishes to know whether Article 78(1) of Regulation No 1408/71 must be interpreted as meaning that, in calculating the supplement payable where the amount of the benefits actually received in the Member State of residence is less than that of the benefits which the orphan would be entitled to under the legislation of another Member State, account must be taken of all benefits intended for the orphan in the Member States concerned, in so far as those benefits fall within the definition in Article 78(1) of Regulation No 1408/71.

11 It should be noted to begin with that benefits for orphans, which must be compared in order to calculate the supplement at issue, are subject to different rules in Italian law and German law. The orphan's pension and family supplement — which is a family allowance for the purposes of Article 78(1) of Regulation No 1408/71 — paid under the Italian legislation must in fact be compared with the orphan's pension payable under the German system.

12 The plaintiffs point out that the family supplement paid in accordance with the Italian rules does not constitute part of the orphan's pension, but is an independent benefit which must be compared with the German family allowances which are paid for dependent children irrespective of the occurrence of any event giving entitlement to insurance benefits. Consequently, the family supplement should not be taken into account by the German institutions responsible for payment of orphans' pensions.

13 The LVA and the Commission, on the other hand, consider that the essential point is what benefits, within the meaning of Article 78 of Regulation No 1408/71, are provided for in national law in the event of the death of an insured worker. Since the family supplement in Italy forms part of those benefits and is actually received by the plaintiffs, it should therefore be taken into account in calculating the supplement payable by the competent institution in Germany.

14 In reply to the questions referred by the Landessozialgericht, it should be noted that the Court has interpreted Article 78(2)(b)(i) of Regulation No 1408/71 as meaning that where the amount of the benefits actually received in the Member State of residence is lower than that of the benefits provided for under the legislation of another Member State, an orphan is entitled to receive from the competent institution of the latter State a benefit supplement equal to the difference between the two amounts (see as the most recent authority the judgment in Case C-251/89 *Athanasopoulos* [1991] ECR I-2797).

15 It follows from that case-law that an orphaned child of a migrant worker cannot be deprived of an entitlement to higher benefits available to him under the legislation of a Member State other than that in which he resides. However, he cannot be allowed rights greater than those he would be able to claim under the legislation of that other Member State if he were resident there. Such a result can be brought about only if the institution of the latter Member State can set off against the benefits it must provide all the benefits paid in the Member State of residence for the maintenance of the orphan, regardless of their nature or designation.

16 The information provided by the Commission shows that national systems of assistance for orphans vary considerably. In view of this variation, and in order to avoid arbitrary differences according to the national systems applicable, the term 'benefits' for orphans in Article 78(1) of Regulation No 1408/71 must be interpreted as referring to all benefits intended under the applicable national system for the maintenance of orphans, whatever the character and designation of those benefits may be.

17 Consequently, the amount of the benefit supplement for orphans must be calculated by comparing all the benefits intended for the maintenance of the orphan in question, actually provided in the Member State of residence, with all the benefits intended for the maintenance of the said orphan which he would be entitled to if resident in the other Member State.

18 The reply to the questions submitted by the Bayerisches Landessozialgericht must therefore be that Article 78 of Council Regulation No 1408/71 of 14 June 1971 must be interpreted as meaning that, in calculating the benefit supplement payable where the amount of the benefits actually received in the Member State of residence is less than that of the benefits which the orphan would be entitled to under the legislation of another Member State, all the benefits intended for the orphan in the Member States concerned must be taken into account, in so far as those benefits fall within the definition in Article 78(1) of Regulation No 1408/71.

Costs

19 The costs incurred by the Belgian Government and by the Commission of the European Communities, 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 (Second Chamber),

in answer to the questions referred to it by the Bayerisches Landessozialgericht by order of 17 May 1990, hereby rules:

Article 78 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 consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983, must be interpreted as meaning that, in calculating the benefit supplement payable where the amount of benefits actually received in the Member State of residence is less than that of the benefits which the orphan would be entitled to under the legislation of another Member State, all the benefits intended for the orphan in the Member States concerned must be taken into account, in so far as those benefits fall within the definition in Article 78(1) of Regulation (EEC) No 1408/71.

Schockweiler Mancini Murray

Delivered in open court in Luxembourg on 19 March 1992.

J.-G. Giraud
Registrar

F. A. Schockweiler
President of the Second Chamber