JUDGMENT OF THE COURT
OF 20 APRIL 1978 [1]

Silvio Ragazzoni
v Caisse de Compensation pour Allocations Familiales "Assubel" (preliminary ruling requested by the Tribunal du Travail, Brussels)

"Family allowances"

Case 134/77

Social security for migrant workers — Family allowances — Pursuit of a professional or trade activity by a worker in one Member State — Residence of members of family in another Member State — Pursuit of a professional or trade activity by the spouse of the worker in the country of residence — Rights to family benefits or allowances — Community rule against overlapping benefits — Conditions for the application

(Regulation No 1408/71 of the Council, Arts. 73 and 76)

Pursuit of a professional or trade activity in the State in whose territory the members of the family are residing is not a sufficient condition for the suspension of the entitlement conferred by Article 73 since it is necessary in addition that the family benefits should be "payable" under the legislation of that Member State.

Consequently the suspension, under Article 76 of Regulation No 1408/71, of the entitlement to family benefits or allowances in pursuance of Article 73 of that regulation is not applicable when the father works abroad in a Member State whilst the mother is employed in the country in which the other members of the family reside and has not acquired under the legislation of the said country of residence a right to family allowances either because only the father is acknowledged to have the status of head of household or because the conditions for awarding to the mother the right to payment of the allowances have not been fulfilled.

In Case 134/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Tribunal du Travail (Labour Tribunal), Brussels, for a preliminary ruling in the action pending before that court between

SILVIO RAGAZZONI

1 — Language of the Case: French.

and

CAISSE DE COMPENSATION POUR ALLOCATIONS FAMILIALES "ASSUBEL" on the interpretation of the suspension of the entitlement to family allowances provided for by Article 76 of Regulation No 1408/71 of the Council of 14 June 1971 (Official Journal, English Special Edition, 1971 (II) p. 416),

THE COURT

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), A. M. Donner, J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart, A. O'Keeffe and A. Touffait, Judges,

Advocate General: F. Capotorti
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities may be summarized as follows:

I — Facts and procedure

Mr Ragazzoni, the plaintiff in the main action, is an Italian employed in Belgium; his wife and three children reside in Italy where his wife is employed.

The Caisse de Compensation pour Allocations Familiales "Assubel" (Assubel Family Allowance Compensation Fund, hereinafter referred to as "the Fund"), the defendant in the main action, refused the claim for the payment of family allowances which Mr Ragazzoni submitted on the basis of his work in Belgium; it relied upon Article 76 of Regulation (EEC) No 1408/71 which lays down rules of priority in cases of overlapping entitlement to family benefits or family allowances, which is worded as follows:

"Entitlement to family benefits or family allowances under 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."

Mr Ragazzoni pointed out that by virtue of the Italian law in force (Articles 1 and 3 of the consolidated version of the laws relating to family allowances issued by Decree No 797 of the President of the Italian Republic (Gazzetta Ufficiale of 7 September 1955 No 206, Ordinary Supplement) his wife is not entitled to family allowances in Italy in respect of her infant children because the Italian legislation concerning family allowances makes no provision for the transfer of the status of head of household to a mother who works when the husband is employed abroad.

The Fund replied that the fact that under the legislation of the country of residence family allowances are provided at less favourable rates than those of the Belgian system or that family allowances are not provided cannot have the effect of creating for the Belgian system a power which is not conferred upon it under the European provisions.

The Tribunal du Travail, Brussels, at the request of Mr Ragazzoni and the suggestion of the Ministère Public (Public Prosecutor's office) stayed the proceedings and, by a judgment of 25 October 1977, which was received at the Court Registry on 8 November 1977, submitted to the Court of Justice of the European Communities the following question:

"Is the suspension of the entitlement to family allowances provided for by Article 76 of Regulation (EEC) No 1408/71 applicable when the father is employed abroad in a Member State of the EEC but the mother is employed in the country in which the other members of the family reside and when the legislation of the country of residence makes provision for the payment of family allowances only to heads of household who are working in the territory of the country of residence and recognizes only the father as having the status of head of household?"

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice, written observations were lodged by the plaintiff in the main action, represented by D. Rossini, Director of the Welfare Department of the Associazioni Cristiane Lavoratori Italiani (Christian associations of Italian workers), the Commission of the European Communities, represented by its Legal Adviser, Jean-Claude Seche, acting as Agent, the Belgian Government, represented by Mr Califice, the Minister for Social Security, and the Italian Government, represented by its Ambassador, Mr A. Maresca, acting as Agent, assisted by Mr F. Favara of the Avvocatura dello Stato (State Advocate's Office).

II — Summary of the written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court

The *plaintiff in the main action* recalls his family situation and the facts set out in the decision of the Tribunal du Travail. He states that under Italian law the fact that the father, the head of household, resides in another State does not automatically entail the transfer of status of head of household to the mother except in strictly defined cases (desertion of the family by the father, permanent unfitness for work, unemployment, military service or death of the father etc.). Mr Ragazzoni does not fulfil any of the prescribed conditions and his wife has not been authorized to receive family allowances in Italy, as was stated by the Istituto Nazionale della Previdenza Sociale (national social welfare institution), Turin, to which she is affiliated.

The plaintiff in the main action points out first that in actual fact despite the objectives pursued by Articles 48, 51 and 117 of the Treaty and despite the

principle embodied in Article 114 of Regulation No 574/72 which provides for the provisional payment of benefits in the case of a dispute as to which legislation should apply or which institution should provide the benefits, he has not received any family allowances since January 1975, either from the Belgian institution or from the Italian institution.

With regard to the substance of the dispute he considers that it is for the Belgian institution to pay the family allowances for three reasons:

1. Article 76 of Regulation No 1408/71 constitutes an exception to the rule in accordance with which family allowances should be granted in the country in which the migrant worker is employed (cf. twelfth recital in the preamble to the regulation and Articles 73 (1) and 75 (1) (a) thereof);
2. The actual wording of Article 76 establishes that is applies only if the conditions for the acquisition of the right have been fulfilled and the family benefits have actually been paid in the country of origin, which is not the fact in the present case.
3. The judgment of the Court of 17 June 1970 in Case 3/70 *(Beninato (née Di Bella)* [1970] ECR 415) has established that Community regulations in the matter of social security for migrant workers are not to be interpreted in such a way as to deprive those concerned of benefits to which they are entitled by reason of their place of permanent residence and that a person must not be regarded as having come under the legislation of another Member State unless he has in fact satisfied all the conditions under which he may acquire a right.

The plaintiff in the main action considers furthermore that the disputes which arise in this sphere could be avoided if, where overlapping benefits are payable under the legislation of more than one State, only the higher benefits were paid. The apportionment of the costs thereof could be effected directly between the competent institutions, as has been established with regard to benefits in respect of occupational diseases (Article 57 of Regulation No 1408/71).

He considers finally that the reply to be given to the preliminary question submitted by the Belgian court might be as follows:

"The suspension of the right to family allowances provided for by Article 76 of Regulation (EEC) No 1408/71 is not applicable where all the conditions required by the legislation of the country of residence of the children have not been fulfilled and the family benefits which would be payable by reason of the pursuit of a professional or trade activity have not in fact been awarded."

The *Commission of the European Communities* states that Article 3 of the consolidated version of the legislation relating to family allowances, dated 30 May 1955, regards primarily the father as head of household. The mother can only be granted this status in specific cases, which do not include the employment abroad of the father. Thus in the present case Italian legislation does not confer an entitlement to family allowances in Italy on the members of the Ragazzoni family.

Since the plaintiff worked in Belgium (that is, in a State other than France, a situation for which special arrangements are made pursuant to Article 73 *et seq.* of the regulation) the solution depends on the country of employment and entails the granting of the family benefits for which provision is made by the legislation of the country where the person concerned is employed at the expense of the latter country (Articles 73 (1) and 75 (1)).

Article 76 with which the preliminary question is concerned lays down rules of priority in cases of overlapping entitlement to family benefits under Article 73 by reason of the pursuit of a professional or trade activity in the country of residence of the members of the family. "This principle that benefits shall not overlap is in fact based on the actual purpose of the family allowances or benefits, as it emerges from the above-mentioned definitions. Since the aim is to offset at public expense to some extent the burdens borne by a family in bringing up children these burdens can only be offset once. Consequently family benefits may not overlap even if the entitlement to the benefits arises by reason of the pursuit of a professional or trade activity".

In order that Article 76 may be applied it is necessary, according to the wording of that article, for the benefits to be "payable" under the legislation of the country of residence, that is to say that an entitlement to the benefits should exist in the country of residence. This may be the case if, for example, the legislation of the country of residence provides for the acquisition of the right to benefits only after the second or third child; since no benefit is payable in respect of the first child Article 76 is not applicable; it becomes applicable after the second or third child.

To return to the example of Italian legislation, Article 76 might in theory apply if the mother worked in another Member State whilst the father was employed in Italy where the children also resided. Nevertheless Article 76 cannot apply unless benefits are payable in the country of residence of the members of the family and in particular in a case such as that referred to by the court making the reference, in which, as the legislation does not grant the right to benefits to the members of the family of the person concerned, the said benefits are clearly not "payable" within the meaning of Article 76. The aim of this provision is not to establish a subsidiary right in the country of residence but to avoid overlapping benefits. Failure to have regard to the fact that no right exists in the country of residence would result in ruling out all rights to benefits by virtue of Italian legislation on the one hand and of the wrong application of Article 76 on the other.

The Commission emphasizes that the Italian delegation stated to the Administrative Commission on Social Security for Migrant Workers that it has "noted the opinion of the other Member States to the effect that Article 76 does not apply where Italy is the contry of residence of the members of the family and where the spouse who is not the head of household pursues a professional or trade activity".

In conclusion the Commission considers that the reply to the question submitted should be as follows:

"Entitlement to family benefits or family allowances may not be suspended under Article 76 of Regulation No 1408/71 unless, by reason of the pursuit of a professional or trade activity, entitlement to benefits or allowances in fact exists in pursuance of the legislation of the Member State in whose territory the members of the family are residing."

The *Belgian Government* first recalls the facts of the dispute and then states that Article 76 "contains a rule of a legislative nature and must be understood as taking priority as a Community provision which is applicable whenever a professional or trade activity is pursued in the territory of the Member State in which the members of the family reside. In fact Article 76 is thus an exception to the application of Article 73 or 74 and applies solely by reason of the pursuit of a professional or trade activity in the country where the members of the family reside. Consequently Article 76 does not refer to the domestic

provisions of the country of residence concerning overlapping but designates the law of that country as the competent legislation within which the right to family benefits or family allowances must be considered. This is shown clearly by Article 10 of Regulation No 574/72, as amended by Regulation No 878/73, which expressly provides that, when a professional or trade activity is pursued in the country in which the members of the family reside, the legislation of that country shall have priority. Accordingly, in order to obtain a common and uniform result in all Member States the said Article 76 must be interpreted in the same way".

The *Italian Government* recalls the meaning of the concept of "family allowances" for the purposes of Regulation No 1408/71 and the scope of the prohibition on overlapping in Article 76. That provision must be interpreted in accordance with the familiar criterion of interpretation to the effect that a derogative provision cannot be extensively applied to cases for which provision has not been expressly made and in accordance with its purpose as a provision prohibiting overlapping, which is intended to prevent the same person from receiving a number of benefits of the same kind in respect of the same insurance period but is not intended in addition to prevent the overlapping of a number of benefits which may be payable to different persons.

The Italian Government then sets out an interpretation of Article 76 very closely approaching that of the plaintiff in the main action. It recalls furthermore that very recently, on 18 December 1977, Law No 903 of 9 December 1977, concerning equal pay for men and women (Gazzetta Ufficiale No 343 of 17 December 1977) entered into force in Italy. Article 9 thereof provides that in future "family allowances ... in respect of dependent members of the family may be paid *alternatively* to an employed wife on the same conditions and subject to the same restrictions as those laid down for the worker": there was thus conferred upon working wives the *right to claim* that family allowances shall be paid to them rather than to their employed husbands. If both parents claim payment of family allowances for dependent children "the family allowances shall be paid to the parent with whom the child lives". It is clear that if a working wife does not avail herself of the option which Law No 903 of 9 December 1977 provides for her, that is to say if she does not claim that the family allowances should be paid to her, the rules established by the earlier provisions of 30 May 1955 remain in force and applicable.

It is clear that the new law cannot give rise to a different interpretation of Article 76 of Regulation (EEC) No 1408/71 as it does not have retroactive effect and thus does not alter the circumstances of the dispute pending before the Tribunal du Travail, Brussels; likewise it will not apply in future to Mr Ragazzoni, the plaintiff, unless his wife decides to exercise the option made available to her under Article 9 of Law No 903 of 9 December 1977.

Consequently the Italian Government concludes that in pursuance of Italian legislation family allowances are not "payable" to the wife of the plaintiff in the main action. The argument of the Fund that the legislation of the country of residence of the members of the family cannot confer upon the Belgian system power which the European provisions do not confer fails to take account of the fact that Article 76 is not a provision effecting a distribution of powers between "institutions" but merely constitutes a rule prohibiting overlapping, to be applied when family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing.

In conclusion the Italian Government suggests that the Court of Justice should deliver a ruling in the following terms:

— "Article 76 of Regulation (EEC) No 1408/71 must be interpreted to mean that it does not require the suspension of family allowances paid to a worker in the event of the pursuit of a professional or trade activity by a member of the family, even if family allowances are payable by reason of this latter activity to the member of the worker's family;

— Article 76 of Regulation (EEC) No 1408/71 must be interpreted to mean that it does not establish a criterion for distributing powers between 'institutions' but merely sets out an important provision against overlapping to apply where family allowances are actually 'payable' also under the legislation of the Member State where the members of the family are residing."

III — Oral procedure

The representatives of Mr Ragazzoni and of the Commission of the European Communities appeared at the hearing on 9 March 1978. They expanded the arguments which they had set out in their written observations and stated their points of view concerning the problem constituted by the existence of the Italian Law No 903 of 9 December 1977 which was referred to by the Italian Government in its observations.

The plaintiff in the main action emphasized that the provisions must be taken into consideration as they stood at the time of the dispute. Nevertheless he referred to the situation which might come about through the application of the new Italian provision and considered that "if the right exists in two States the higher benefits alone should be paid, in conjunction with a system of compensation and repayment between the competent funds".

The *Commission* made certain supplementary remarks on the observations lodged by the Belgian Government and the Italian Government. First, it is impossible to take a comparison of the rates into consideration, even if this situation is undesirable from the legislative point of view. Secondly, the Council does not have power pursuant to Article 51 of the Treaty to confer a right in a country of residence where such a right does not exist under national legislation. Thirdly, if the new Italian law is viewed in the context of Community law the Italian argument would result, according to the Commission, in providing a choice between the family allowances of the country of residence and those of the country of employment; such a choice is in principle excluded by Regulation No 1408/71 with regard to applicable legislation and clearly is not provided for in Article 76. The Community rule prohibiting overlapping must accordingly prevail over any national right to exercise an option. The Commission emphasizes the danger of providing too abstract a reply to a question submitted within the framework of specific legislation in force at the time of the main action.

The Advocate General delivered his opinion at the hearing on 16 March 1978.

Decision

1 By a judgment of 25 October 1977, which was received at the Court Registry on 8 November 1977, the Tribunal du Travail, Brussels, pursuant to Article 177 of the EEC Treaty, requested a preliminary ruling on the interpretation of Article 76 of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

2 The question has been raised within the framework of a dispute between the Belgian Fund "Assubel" and an Italian worker employed in Belgium, whose wife resides with their three children in Italy where she pursues a professional or trade activity.

3 The Belgian institution has rejected the claim of the Italian worker for the payment in Belgium of family allowances.

4 The institution relied upon Article 76 of Regulation No 1408/71 which establishes rules of priority in cases of overlapping entitlement to family allowances and which provides that "entitlement to family benefits or family allowances under 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".

5 The Fund infers from the foregoing that that provision lays down a rule of legislative nature and must be understood as taking priority as a Community provision which is applicable whenever a professional or trade activity is pursued in the territory of the Member State in which the members of the family reside.

6 In this case Article 76 is an exception to the principle laid down by Article 73 whereby a worker subject to the legislation of a Member State other than France is entitled to the family allowances 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 on the territory of the first Member State.

7 The objection which may be raised to that view is that, apart from the fact that Article 76 is only intended to limit the possibility of overlapping benefits, pursuit of a professional or trade activity in the State in whose territory the members of the family are residing is not sufficient for the suspension of the entitlement conferred by Article 73 since it is necessary in addition that the family benefits should be "payable" under the legislation of that Member State.

8 For family allowances to be regarded as "payable" under the legislation of the Member State in whose territory the members of the family are residing the law of such State of residence must recognize the right to the payment of allowances in favour of the person in that family who works in such State.

9 The person concerned must thus fulfil all the conditions required by the domestic legislation of that State in order to exercise that right.

10 It is not disputed that in the situation in which the dispute arose and on the basis of the provisions in force in Italy at the time, Italian legislation, in that it did not confer the status of head of household upon a mother who was neither separated from nor abandoned by her husband, precluded the right of the former to receive family allowances for her children.

11 It follows that the family benefits or allowances were not "payable" under the legislation of the Member State in whose territory the members of the family were residing.

12 The reply to the question must accordingly be that the suspension, under Article 76 of Regulation No 1408/71, of the entitlement to family benefits or allowances in pursuance of Article 73 of that regulation is not applicable when the father works abroad in a Member State whilst the mother is employed in the country in which the other members of the family reside and has not acquired under the legislation of the said country of residence a right to family allowances either because only the father is acknowledged to have the status of head of household or because the conditions for awarding to the mother the right to payment of the allowances have not been fulfilled.

Costs

13 The costs incurred by the Belgian Government, the Italian Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable.

14 As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Tribunal du Travail, Brussels, by a judgment of 25 October 1977, hereby rules:

The suspension under Article 76 of Regulation No 1408/71, of the entitlement to family benefits or allowances in pursuance of Article 73 of that regulation is not applicable when the father works abroad in a Member State whilst the mother is employed in the country in which the other members of the family reside and has not acquired under the legislation of the said country of residence a right to family allowances either because only the father is acknowledged to have the status of head of household or because the conditions for awarding to the mother the right to payment of the allowances have not been fulfilled.

Kutscher Sørensen Bosco Donner Mertens de Wilmars

Pescatore Mackenzie Stuart O'Keeffe Touffait

Delivered in open court in Luxembourg on 20 April 1978.

A. Van Houtte
Registrar

H. Kutscher
President