JUDGMENT OF THE COURT (Second Chamber)

8 July 2004 *

In Joined Cases C-502/01 and C-31/02,

REFERENCE to the Court under Article 234 EC by the Sozialgericht Hannover (Germany) (C-502/01) and the Sozialgericht Aachen (Germany) (C-31/02) for a preliminary ruling in the proceedings pending before those courts between

Silke Gaumain-Cerri

and

Kaufmännische Krankenkasse-Pflegekasse,

interested party:

Bundesversicherungsanstalt für Angestellte,

* Language: German.

Maria Barth

and

Landesversicherungsanstalt Rheinprovinz,

interested party:

PAX Familienfürsorge Krankenversicherung,

Bundesministerium für Gesundheit und Soziale Sicherung,

on the interpretation of the provisions of the EC Treaty and of secondary legislation relating to freedom of movement of Union citizens and in particular of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community as amended and updated by Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1),

THE COURT (Second Chamber),

composed of: C.W.A. Timmermans, President of the Chamber, J.-P. Puissochet (Rapporteur), R. Schintgen, F. Macken and N. Colneric, Judges,

Advocate General: A. Tizzano,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the Kaufmännische Krankenkasse — Pflegekasse, by K. Böttcher, acting as Agent,

— the German Government, by C.-D. Quassowski and M. Lumma, acting as Agents (C-31/02),

— the Greek Government, by D. Kalogiros and G. Alexaki, acting as Agents (C-31/02),

— the Commission of the European Communities, by H. Michard and H. Kreppel, acting as Agents,

having regard to the Report of the Judge-Rapporteur

after hearing the Opinion of the Advocate General at the sitting on 2 December 2003,

gives the following

Judgment

1 By orders of 12 December 2001 and 18 January 2002, received at the Court on 27 December 2001 (C-502/01) and 4 February 2002 (C-31/02) respectively, the Sozialgericht Hannover (Social Court, Hanover) and the Sozialgericht Aachen (Social Court, Aachen) referred to the Court for a preliminary ruling under Article 234 EC a number of questions on the interpretation of the provisions of the EC Treaty and of secondary legislation relating to freedom of movement of Union citizens and in particular of Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community as

amended and updated by Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1, 'Regulation No 1408/71').

2 Those questions were raised in proceedings between Ms Gaumain-Cerri and the Kaufmännische Krankenkasse — Pflegekasse (hereinafter 'the KKH care fund') and Ms Barth and the Landesversicherungsanstalt Rheinprovinz respectively with regard to decisions adopted by those two bodies refusing to pay pension insurance contributions to which they claim to be entitled as third parties providing assistance to reliant persons in receipt of benefits under German social insurance against the risk of reliance on care ('care insurance').

National legal framework

3 In Germany, care insurance was introduced, from 1 January 1995, by the Pflegeversicherungsgesetz (Care Insurance Law, hereinafter 'the Law'), contained in Volume XI of the Sozialgesetzbuch (German Code of Social Law, hereinafter 'the SGB'). It is designed to cover the costs entailed if insured persons should become reliant on care, that is to say, if a permanent need were to arise for those insured to resort, in large measure, to assistance from other persons in the performance of their daily routine (bodily hygiene, nutrition, moving around, housework, and so on).

4 Under the Law, any person insured, either voluntarily or compulsorily, against sickness must contribute to the care insurance scheme.

5 Care insurance gives entitlement, first, to benefits designed to cover the costs incurred for care provided in the home by a third person. Those benefits, designated as 'home care', the amount of which depends on the degree of reliance on care on the part of the person concerned, may be provided, at the choice of the recipient, either in the form of care dispensed by authorised bodies or in the form of a monthly allowance, known as 'the care allowance', enabling recipients to choose the form of aid they consider most appropriate to their condition.

6 Secondly, care insurance gives entitlement to direct payment of the cost of nursing home or hospital care provided to the insured person, to allowances designed to cover the absence on holiday of the third party who usually looks after the person insured and to allowances and payments for various costs entailed by the insured person's reliance on care, such as the purchase and installation of special equipment or work required to adapt the home.

7 Lastly, care insurance will, in certain circumstances, pay old age and invalidity insurance contributions, as well as accident insurance, for the third party assisting the insured person.

8 It is such payment of old age insurance contributions which has given rise to the two disputes in the main proceedings.

The disputes in the main proceedings and the questions referred for a preliminary ruling

9 Ms Gaumain-Cerri, of German nationality, and her spouse, who is French, reside in France and practise their profession on a part-time basis as frontier workers in an undertaking established in Germany. By virtue of that employment, both are covered by German care insurance. Their son, who lives with them, is handicapped and, as a dependant of his parents, is in receipt of care insurance benefits, namely the care allowance. The parents themselves, at home and on a voluntary basis, are in the role of carers providing assistance to a reliant person. However, the KKH care fund, the body providing insurance against the risk of reliance on care in this case, refuses to pay the old age insurance contributions of Ms Gaumain-Cerri and of her husband in respect of their activity as carers for a reliant person on the ground that they are not resident within Germany. Under the relevant provisions of the SGB, in view of the non-professional nature of that activity and in the absence of residence within the country, they are neither obliged nor entitled to statutory old age insurance. Moreover, the non-professional nature of the activity in question means that they do not have the status of worker enabling them to rely on the provisions of Regulation No 1408/71.

10 For her part, Ms Barth, who is of German nationality, is resident in Belgium, near the German border, and looks after a retired civil servant in Germany. She receives from the latter EUR 400 per month. The assistance provided by Ms Barth is regarded, in the light of the relevant provisions of the SGB, as non-professional. The reliant person whom she assists is in receipt of care insurance benefits from two bodies, the Landesamt für Besoldung und Versorgung Nordrhein-Westfalen, as the basic social insurance provider for retired civil servants, and the PAX Familienfürsorge Krankenversicherung ('the PAX'), as an additional insurer under a compulsory private care insurance policy the conditions of which are required by law to be identical to those applicable to the basic social insurance. For reasons

similar to those put forward in respect of Ms Guamain-Cerri, regarding the fact that she is resident outwith Germany, the Landesversicherungsanstalt Rheinprovinz discontinued payment of the contributions enabling Ms Barth to acquire pension rights which until then the PAX and the Landesamt had made.

11 Ms Gaumain-Cerri and Ms Barth brought proceedings before the Sozialgericht Hannover and the Sozialgericht Aachen respectively challenging the decisions against them and claiming that the care insurance should pay the old age insurance contributions on their behalf in respect of their activity assisting a reliant person.

12 In those circumstances, the Sozialgericht Hannover decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Can the expressions "sickness benefit" and "old age benefit" within the meaning of Article 1 of Regulation No 1408/71 cover benefits paid by one insurer to another if the insured derives only an abstract and indirect advantage therefrom (payment of pension insurance contributions by the care insurance fund on behalf of a voluntary carer)? If they can, under what circumstances can they do so?

(2) Is there a prohibition of discrimination under primary or secondary Community law from which it follows that a benefit as described in (1) above is to be granted irrespective of whether the activity conferring the entitlement to benefit is carried on in Germany or in another EU Member State, and irrespective of where the insured or the immediate beneficiary has his residence?'

13 For its part, the Sozialgericht Aachen also decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are the provisions of Regulation ... No 1408/71 ... also applicable to German care insurance scheme if cover for the risk of reliance on care under Articles 23, in conjunction with Articles 110, of Volume XI of the [SGB], which relates to Social Care Insurance, is based in whole or in part on a private care insurance policy?

(2) Do the contributions payable to the statutory pension insurance scheme by care insurance institutions on behalf of carers not acting in the course of employment pursuant to Article 44 of SGB XI, in conjunction with the first sentence of Article 3(1)(a) and Article 166(2) of SGB VI, which relates to Statutory Pension Insurance, constitute "sickness benefits" within the meaning of Article 4(1)(a) of Regulation No 1408/71? If so, may such benefits be payable on behalf of carers who provide care in the country of the competent institution but live in a different Member State?

(3) Are carers within the meaning of Article 19 of SGB XI workers within the meaning of Article 39 EC? If so, does that preclude denying them the right to have "pension insurance contributions" paid on their behalf on the basis that they do not have their residence or habitual place of stay in the relevant country?'

The questions referred to the Court

Admissibility

14 The German Government submits that the questions referred by the Sozialgericht Aachen are irrelevant. In its view, Ms Barth, under national law, is already entitled to payment of the statutory old age insurance contributions by virtue of the fact that the care is provided in Germany. The place of residence of Ms Barth is irrelevant and her application should have been declared admissible.

15 As the Court has consistently held, the procedure provided for in Article 234 EC is an instrument for cooperation between the Court of Justice and the national courts which enables it to provide them with the elements of interpretation of Community law they require in order to settle disputes before them. On the other hand, it is not for the Court to interpret, in the context of that procedure, the national law of a Member State and, save exceptionally, it is for the national court, which is alone in having a direct knowledge of the facts of the case and of the arguments put forward by the parties and which must assume the responsibility of giving judgment in the case, to assess, with full knowledge of the matter before it, the relevance of the questions of law raised by the dispute before it and the need for a preliminary ruling so as to enable it to give judgment (see, in particular Case 53/79 *Damiani* [1980] ECR 273, paragraph 5). In the present case, it is not apparent that the questions referred by the Sozialgericht Aachen are in any way exceptional such as to justify not examining them.

Substance

16 The questions referred by the two national courts concern two main aspects.

17 First, those courts are asking whether benefits such as payment, by the insurer against the risk of reliance on care, of the old age insurance social contributions of a carer providing care at the home of a reliant person, in the circumstances prevailing in the main cases, constitutes "sickness benefit" and "old age benefit" within the meaning of Article 1 of Regulation No 1408/71. The Sozialgericht Aachen is asking in particular whether the fact that the abovementioned benefit is provided by a private-law body acting under the same conditions as PAX so far as concerns the person cared for by Ms Barth is of any relevance to the answer (first question of the Sozialgericht Hannover and of the Sozialgericht Aachen and first part of the second question of the latter).

18 Secondly, the national courts are asking whether the Treaty, in particular Article 39 EC, Regulation No 1408/71 or other provisions of secondary law preclude the benefit from being refused on the ground that a reliant person or a third person caring for him, in the circumstances of the main proceedings, resides outwith the competent State, that is to say that of the institution insuring the reliant person against the risk of becoming reliant (second question of the Sozialgericht Hannover, second part of the second and third question of the Sozialgericht Aachen).

Whether Regulation No 1408/71 applies to the payment of old age insurance contributions of a third person assisting a reliant person in circumstances such as those in issue in the main proceedings

19 In the judgment in Case C-160/96 *Molenaar* [1998] ECR I-843, delivered in reply to a question raised in the context of a dispute concerning the refusal to pay the care allowance in question to persons covered by that care insurance on the ground that they did not reside in Germany, the Court stated that:

'22 [...] it appears from the file that care insurance benefits are designed to develop the independence of persons reliant on care, in particular from the financial point of view. The system introduced is aimed at encouraging prevention and rehabilitation in preference to care and at promoting home care in preference to care provided in hospital.

23 Care insurance gives entitlement to full or partial direct payment of certain expenditure entailed by the insured person's reliance on care such as care provided in the home, in specialised centres or hospitals, the purchase of equipment required by insured persons, the carrying out of work in the home and the payment of monthly financial aid allowing the insured to choose the method of assistance they prefer and, for example, to remunerate in one form or another the third party assisting them. The care insurance scheme provides cover, furthermore, against the risks of accident, old age and invalidity for some of those third parties.

24 Accordingly, benefits of that type are essentially intended to supplement sickness insurance benefits to which they are, moreover, linked at the

organisational level, in order to improve the state of health and the quality of life of persons reliant on care.

25 In those circumstances, even if they have their own characteristics, such benefits must be regarded as "sickness benefits" within the meaning of Article 4 (1)(a) of Regulation No 1408/71.'

20 It follows from that judgment that benefits intended to cover the risk of old age of a third party assisting a person reliant on care, such at those provided for by the care insurance system, also constitute 'sickness benefits' payable to the person reliant on care, within the meaning of Article 4(1)(a) of Regulation No 1408/71. There are no circumstances peculiar to the present case which call for that assessment to be revised.

21 In particular, the fact that a third party assisting the person reliant on care is personally in receipt of such a benefit is, as PAX points out, of no consequence on account of the fact that the person whose reliance on care justifies the grant of the whole of the benefit is thereby benefiting from a scheme designed to help him to receive, in the most favourable conditions possible, the care which his condition requires. That benefit is thus fully covered by that branch of sickness insurance. The same may be said, moreover, with regard to the care allowance proper when it is used in whole or in part to remunerate the third party assisting the person reliant on care, as is Ms Barth's case.

22 None the less, the fact that care insurance is at times provided in whole or in part by a private insurer on the basis of a private insurance contract cannot, in such a case, put it outside the scope of Regulation No 1408/71, since the conclusion of such a contract follows directly from the application of the social security legislation in issue. In that regard, contrary to the assumption of the Greek Government in its observations to the Court, the obligation in question does not arise from provisions of industrial agreements as mentioned in the second paragraph of Article 1(j) of Regulation No 1408/71, which are in principle excluded from the scope of that regulation.

23 The answer to the first set of questions referred by the national courts as summarised in paragraph 17 of this judgment must therefore be that a benefit such as the payment, by the body providing care insurance, of old age insurance contributions of the third party providing care in the home of a person reliant on care in the circumstances of the cases in the main proceedings constitutes a sickness benefit for the benefit of the person reliant on care covered by Regulation No 1408/71.

Whether it is possible to refuse to pay the old age insurance contributions of a third person assisting a reliant person on the ground that one or other of those persons is resident on the territory of a Member State other than the competent State

24 First of all it is necessary to examine, in a case such as that of Ms Gaumain-Cerri, whether the direct payment of the old age insurance contributions of the third party assisting the reliant person is to be made in accordance with the legislation of the State of residence of the reliant person or in accordance with that of the competent State, which, in such a case, are different.

25 In that connection, in *Molenaar*, cited above, the Court was called upon to examine whether the various care insurance benefits constituted sickness benefits 'in kind' or sickness benefits 'in cash'. Under Articles 19 and 20 of Regulation No 1408/71, which relate, as regards sickness and maternity insurances for employed and self-employed workers and members of their families, to circumstances in which the persons concerned are resident in a Member State other than the competent State, including as frontier workers, the fact that benefits are benefits 'in kind' or benefits 'in cash' may have an effect as to which legislation is applicable.

26 In *Molenaar*, the Court stated:

'31 In its judgment in Case 61/65 *Vaassen* v *Beambtenfonds Mijnbedrijf* [1966] ECR 261, in particular at p. 278, the Court has already stated, in connection with Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (Official Journal of 16 December 1958, p. 561 et seq.), which preceded Regulation No 1408/71 and used the same terminology, that the term "benefits in kind" does not exclude the possibility that such benefits may comprise payments made by the debtor institution, in particular in the form of direct payments or the reimbursement of expenses, and that "cash benefits" are essentially those designed to compensate for a worker's loss of earnings through illness.

32 As stated above ... care insurance benefits consist, first, in the direct payment or reimbursement of expenses incurred as a result of the insured person's reliance on care, in particular medical expenses entailed by that condition. Such benefits, which are designed to cover care received by the person concerned, both in the home and in specialised centres, purchases of equipment and work carried out, indisputably fall within the definition of "cash benefits" referred to in [Article] 19(1)(a) ... of Regulation No 1408/71.

33 However, although the care allowance is also designed to cover certain costs entailed by reliance on care, in particular those relating to aid provided by a third person, rather than to compensate for loss of earnings on the part of the recipient, it nevertheless displays features distinguishing it from sickness insurance benefits in kind.

34 First, payment of the allowance is periodical and is not subject either to certain expenditure, such as care expenditure, having already been incurred, or a fortiori to the production of receipts for the expenditure incurred. Secondly, the amount of the allowance is fixed and independent of the costs actually incurred by the recipient in meeting his daily requirements. Thirdly, recipients are to a large extent unfettered in their use of the sums thus allocated to them. In particular, as the German Government itself pointed out, the care allowance may be used by recipients to remunerate a member of their family or entourage who is assisting them on a voluntary basis.

35 The care allowance thus takes the form of financial aid which enables the standard of living of persons requiring care to be improved as a whole, so as to compensate for the additional expense brought about by their condition.

36 A benefit such as the care allowance must therefore be regarded as a sickness insurance "cash benefit", as referred to in [Article] 19(1)(b) ... of Regulation No 1408/71.'

27 Payment of the old age insurance of a third person to whom a reliant person resorts for assistance at home must itself also be categorised as a sickness insurance cash benefit by reason of its ancillary nature to the care insurance proper, inasmuch as it directly supplements the latter in respect of one of its possible purposes, namely to pay for assistance in the home provided by a third person, which it is designed to facilitate.

28 However, it is clear from Article 19(1)(b) and (2) of Regulation No 1408/71 that members of the family of a worker who are resident on the territory of a Member State other than the competent Member State must be entitled in the State of residence to sickness insurance cash benefits provided by the competent institution of the other Member State in accordance with the legislation which it administers, unless they are entitled to the same benefits under the legislation of the State within which they are resident. Accordingly, the payment of old age insurance on behalf of the third party assisting a reliant person who is resident in France and who belongs to the family of a worker covered by German care insurance must be insured by the competent German institution in accordance with the German legislation on care insurance as if the reliant person were resident in Germany, unless that person is entitled to an equivalent benefit under French law.

29 It is not apparent from the case-file that, in the first case in the main proceedings, the KKH reliance fund claimed that French law enabled payment of old age insurance contributions on behalf of Ms Gaumain-Cerri by virtue of the assistance she provides to her reliant son. In the absence of such a possibility, it is thus the legislation of the competent State, in this case Germany, in the circumstances described in the preceding paragraph, which is to be applied.

30 In a case such as that of the person receiving assistance from Ms Barth, it is not disputed that the legislation to be applied is that of the competent State, in this case again Germany, where that reliant person is resident.

31 It thus remains to be examined, in a situation in which the law of the competent State applies, whether the competent institution may refuse to grant a particular care insurance benefit, namely the payment of the old age insurance contributions on behalf of the third party assisting the reliant person, on the ground that that third party is not resident within the competent Member State.

32 In cases such as those in the main proceedings, the reply must in any event be in the negative, without it being necessary to take a position, as did a number of interveners which submitted observations to the Court, on the issue of whether the third parties concerned are to be regarded as workers within the meaning of Article 39 EC or of Regulation No 1408/71.

33 It is not disputed that, in the main proceedings, those third parties possess Union citizenship conferred by Article 17 EC.

34 The status of Union citizenship enables nationals of the Member States who find themselves in the same situation to enjoy within the scope of the Treaty the same treatment in law, subject to such exceptions as are expressly provided for (see, among others, Case C-224/98 *D'Hoop* [2002] ECR I-6191, paragraph 28).

35 However, in cases such as those constituting the subject-matter of the main proceedings, refusal to pay the old age insurance contributions on behalf of a third party assisting a person reliant on care on the ground that he is not resident in the

competent State, the legislation of which is applicable, leads to different treatment of persons finding themselves in the same situation, that is to say of providing assistance on a non-professional basis, within the meaning of the legislation of the competent State, to persons covered by the care insurance provided for under that same legislation. In that context, in view of the purpose of the activity carried on by third parties assisting persons reliant on care, the condition as to residency of such third parties appears to afford different treatment to comparable situations, rather than to constitute a factor objectively establishing a difference in their situations and thus justifying such different treatment, and therefore constitutes discrimination prohibited by Community law.

36 The answer to the second set of questions referred by the national courts as summarised in paragraph 18 of the present judgment must therefore be that, so far as concerns benefits such as those under German care insurance accorded in the circumstances of the cases in the main proceedings to an insured person resident on the territory of the competent State or to a person resident on the territory of another Member State and covered by that insurance as a member of the family of a worker, the Treaty, in particular Article 17 EC, and Regulation No 1408/71 preclude payment of the old age insurance contributions of a national of a Member State in the position of the third party caring for the recipient of those benefits being refused by the competent institution on the ground that that third party or the aforementioned recipient resides in a Member State other than the competent State.

Costs

37 The costs incurred by the German and Greek Governments and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main action, a step in the proceedings pending before the national courts, the decision on costs is a matter for those courts.

On those grounds,

THE COURT (Second Chamber),

in answer to the questions referred to it by the Sozialgericht Hannover and the Sozialgericht Aachen, by orders of 12 December 2001 and 18 January 2002, hereby rules:

1. **A benefit such as the payment, by the body providing care insurance, of old age insurance contributions of the third party providing care in the home of a person reliant on care in the circumstances of the cases in the main proceedings constitutes a sickness benefit for the benefit of the person reliant on care covered by Council Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community as amended and updated by Regulation (EC) No 118/97 of 2 December 1996.**

2. **So far as concerns benefits such as those under German care insurance accorded in the circumstances of the cases in the main proceedings to an insured person resident on the territory of the competent State or to a person resident on the territory of another Member State and covered by that insurance as a member of the family of a worker, the Treaty, in particular Article 17 EC, and Regulation No 1408/71, as amended and**

updated by Regulation No 118/97, preclude payment of the old age insurance contributions of a national of a Member State in the position of the third party caring for the recipient of those benefits being refused by the competent institution on the ground that that third party or the aforementioned recipient resides in a Member State other than the competent State.

Timmermans Puissochet Schintgen

Macken Colneric

Delivered in open court in Luxembourg on 8 July 2004.

R. Grass

Registrar

C. W. A. Timmermans

President of the Second Chamber