JUDGMENT OF THE COURT (Fifth Chamber)

3 June 1999 *

In Case C-211/97,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landessozialgericht Niedersachsen (Germany) for a preliminary ruling in the proceedings pending before that court between

Paula Gómez Rivero

and

Bundesanstalt für Arbeit,

joined party:

Federal Republic of Germany,

on the interpretation of Article 16(2), first sentence, 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

* Language of the case: German.

moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1),

THE COURT (Fifth Chamber),

composed of: P. Jann, President of the First Chamber, acting as President of the Fifth Chamber, C. Gulmann, D.A.O. Edward (Rapporteur), L. Sevón and M. Wathelet, Judges,

Advocate General: F.G. Jacobs,

Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— Mrs Gómez Rivero, by A. Nicolás, Head of the Social Affairs Section in the Spanish Consulate-General in Hanover,

— the Finnish Government, by H. Rotkirch, Ambassador, Head of the Legal Service in the Ministry of Foreign Affairs, acting as Agent,

— the Commission of the European Communities, by P. Hillenkamp, Legal Adviser, acting as Agent,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 16 July 1998,

gives the following

Judgment

1 By order of 22 May 1997, received at the Court on 4 June 1997, the Landessozialgericht Niedersachsen (Higher Social Court, Lower Saxony) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Article 16(2), first sentence, of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) (hereinafter 'Regulation No 1408/71').

2 Those questions have been raised in a dispute between Mrs Gómez Rivero and the Bundesanstalt für Arbeit (Federal Labour Office) ('the Bundesanstalt') concerning a decision which, with effect from 1 February 1995, withdrew her entitlement to family benefits in respect of her two dependent children.

Community law

3 Article 2(1) of Regulation No 1408/71 provides:

'This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

4 Article 3(1) of Regulation No 1408/71 provides:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

5 Under Title II, headed 'Determination of the legislation applicable', Article 13 of Regulation No 1408/71 provides:

'1. Subject to Article 14c, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.'

6 Article 16 of Regulation No 1408/71, entitled 'Special rules regarding persons employed by diplomatic missions and consular posts, and auxiliary staff of the European Communities', provides:

'1. The provisions of Article 13(2)(a) shall apply to persons employed by diplomatic missions and consular posts and to the private domestic staff of agents of such missions or posts.

2. However, employed persons covered by paragraph 1 who are nationals of the Member State which is the accrediting or sending State may opt to be subject to

the legislation of that State. Such right of option may be renewed at the end of each calendar year and shall not have retrospective effect.

...'

7 Article 13(2) and (3) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71, as amended and updated by Regulation No 118/97 (hereinafter 'Regulation No 574/72'), provides:

'2. The person concerned who exercises his right of option shall inform the institution designated by the competent authority of the Member State for whose legislation he has opted, at the same time notifying his employer thereof. The said institution shall, where necessary, forward such information to all other institutions of the same Member State, in accordance with directives issued by the competent authority of that Member State.

3. The institution designated by the competent authority of the Member State for whose legislation the person concerned has opted shall issue to him a certificate testifying that he is subject to the legislation of that Member State while he is employed by the diplomatic mission or consular post in question or in the personal service of agents of such mission or post.'

German law

8 Until 31 December 1995, entitlement in Germany to family benefits in respect of dependent children was governed by the Bundeskindergeldgesetz (Federal Law on

Child Allowance) of 31 January 1994 (BGBl. I, 1994, p. 169) ('the BKGG'). Paragraph 1 of the BKGG was worded as follows:

'1. Under the provisions of this Law, the following are entitled to receive child allowance...

1. persons domiciled or having their habitual place of residence in the territory to which this Law applies...

...

3. Non-nationals shall have rights under this Law only if they hold a residence authorisation or residence permit...'

9 Since 1 January 1996, child allowance has been awarded under the Einkommensteuergesetz (Law on Income Tax) of 11 October 1995 (BGBl. I, 1995, p. 1250). Paragraph 62 of that Law provides as follows:

'1. In respect of children as defined in Paragraph 63, those entitled to receive child allowance under this Law shall be:

1. persons domiciled or having their habitual place or residence in the country...

...

2. Non-nationals shall be entitled to receive child allowance only if they hold a residence authorisation or residence permit...'

The dispute in the main proceedings

10 Mrs Gómez Rivero and her husband are Spanish nationals residing in Germany. Mr Gómez Rivero is employed in the Spanish Consulate-General in Hanover. Mrs Gómez Rivero does not work, with the exception of a small job as a home help which is not subject to compulsory social security insurance.

11 Following Mr Gómez Rivero's decision to opt, under Article 16(2), first sentence, of Regulation No 1408/71, to be subject to Spanish social security legislation ('exercise of the right of option'), the Bundesanstalt ceased, with effect from 1 February 1995, to pay to Mrs Gómez Rivero the family benefits previously granted to her in respect of her two children.

12 The Bundesanstalt takes the view that the exercise of the right of option by Mr Gómez Rivero also has effects with regard to his wife, so that the German legislation ceased to apply to Mrs Gómez Rivero once that right had been exercised. Consequently, according to the Bundesanstalt, although Mrs Gómez Rivero satisfies all of the conditions for entitlement to child allowance in Germany, except that which requires that German legislation be applicable to her case, she is no longer entitled to receive such family benefits.

13 Under the Spanish social security scheme, neither Mrs Gómez Rivero nor her husband receives family benefits in respect of dependent children since the family's income exceeds the ceiling under which those benefits are payable.

14 The Landessozialgericht Niedersachsen, on appeal in Mrs Gómez Rivero's case against the decision of the Bundesanstalt, takes the view that the allowances which she received in respect of her dependent children fall within the scope of Regulation No 1408/71, since they must be treated as 'family benefits' within the meaning of Article 4(1)(h) of that regulation. The Landessozialgericht also takes the view that resolution of the case depends on whether German legislation on family benefits is applicable to Mrs Gómez Rivero, a question which is itself subordinate to the question whether the exercise by Mr Gómez Rivero of his right of option produces legal effects in regard to his wife, even though she did not consent to the exercise of that option.

The questions submitted for preliminary ruling

15 Since it had doubts as to the correct interpretation of Article 16(2), first sentence, of Regulation No 1408/71, the Landessozialgericht Niedersachsen decided to stay proceedings and to refer the following two questions to the Court for a preliminary ruling:

'(a) Does the option by a person employed in a consular post under the first sentence of Article 16(2) of Regulation (EEC) No 1408/71 to be subject to the legislation of the sending Member State of which he is a national also have effect for his spouse, not employed by the consular service, who is also a national of the sending Member State,

or

is the legislation of the sending Member State applicable to the spouse only if the spouse also opts to be subject to it?

(b) If the option by the national who is in the consular service also has effect for his spouse, does the effectiveness of the option to be subject to the legislation of the sending Member State presuppose the consent or other cooperation of the spouse who is also affected thereby?'

The first question

16 Depending on the circumstances, a person may claim a family benefit in his capacity as an employed or self-employed person, as a member of the family of such a person, or by reason of his residence in the territory of the Member State concerned, irrespective of whether he is insured under a social security scheme or his spouse or parent is so insured.

17 The case before the national court involves a child allowance granted to any person liable for the maintenance of a child and authorised to reside in Germany, irrespective of whether he is insured under a social security scheme or his spouse or parent is so insured.

18 In those circumstances, the crux of the first question is whether the decision by a person employed in a consular post to opt, in accordance with Article 16(2), first

sentence, of Regulation No 1408/71, to be subject to the social security legislation of the sending Member State of which he is a national has the effect that his spouse may no longer claim a social security advantage which, irrespective of the social cover of her spouse, is guaranteed to her by the legislation of the Member State in which she resides.

19 Mrs Gómez Rivero argues that the exercise of the right of option by her husband cannot result in the loss of entitlement to family benefits which she was receiving up to 1 February 1995, since Regulation No 1408/71 may extend the group of persons entitled to receive family benefits but cannot restrict it.

20 The Finnish Government takes the view that the legislation applicable to the members of the family of an employed person is in general determined by reference to the legislation which applies to the employed person himself. This, it argues, is also the case where the latter has exercised his right of option, since the members of his family are not independently entitled to choose the legislation to which they are subject. Consequently, the decision by Mr Gómez Rivero to opt for the application of Spanish legislation is binding on his wife.

21 For its part, the Commission argues that Article 16(2) of Regulation No 1408/71 is one of the provisions of that regulation which apply to workers only and not to members of their families. It concludes from this that the exercise of the option by Mr Gómez Rivero does not have any legal effect in regard to his wife and that the latter does not have any personal right of option under Article 16(2).

22 Article 16 of Regulation No 1408/71 is a special rule which derogates from the general rule in Article 13(2)(a) of that regulation. Under that general rule, a person employed in the territory of one Member State is subject to the legislation

of that State even if he resides in the territory of another Member State. Article 16(2) of Regulation No 1408/71, on the other hand, may have the consequence of rendering applicable the social security legislation of a Member State other than that in the territory of which the occupation is pursued.

23 According to the wording of Article 16 of Regulation No 1408/71 the right of option for which it provides is a right available to persons employed by diplomatic missions and consular posts and to the private domestic staff of agents of such missions or posts. Like Article 13 of Regulation No 574/72, Article 16 makes no reference whatever to the members of their families.

24 None the less, the exercise or non-exercise by a person employed by a diplomatic mission or consular post of the right of option in favour of the legislation of the sending State does have direct consequences for the extent of the rights which the members of his family can, as such, derive from the social cover of the worker, depending on whether that worker comes under the legislation of the sending State or under that of the State to which he has been sent.

25 On the other hand, the exercise of the right of option cannot deprive the members of the worker's family of the social security advantages which, irrespective of the social cover of the worker himself, are guaranteed to them by the legislation of the Member State in which they reside.

26 As the Court held in Case 7/75 *Mr and Mrs F.* v *Belgian State* [1975] ECR 679, at paragraph 16, it follows from Article 2(1) of Regulation No 1408/71, defining the persons covered by the regulation, read in conjunction with Article 3(1), which sets out the fundamental principle of equal treatment, that the members of a worker's family who have not worked and do not work in an employed capacity, whether professionally or otherwise, as referred to in Title II of that regulation, must be allowed the benefit of the social security legislation of the Member State in which they reside under the same conditions as the nationals of that State.

27 It should be added that, if a member of a worker's family is himself employed in the territory of a Member State, he will be subject to the legislation of that State in accordance with Article 13(2)(a) of Regulation No 1408/71.

28 Should it prove to be the case that both the worker who has exercised his right of option under Article 16 of Regulation No 1408/71 and his spouse may claim the same family benefits during the same period and in respect of the same family member, one in the Member State of which he is a national by reason of that option and under the conditions laid down in Article 73 of that regulation, the other by virtue of the legislation of the Member State in which she resides, the rules designed to avoid overlapping of benefits in such situations would have to be applied.

29 In this regard, Article 10(1)(a) of Regulation No 574/72 provides, *inter alia*, that entitlement to benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment, is to be suspended when, during the same period and for the same member of the family, benefits are due in application of Article 73 of Regulation No 1408/71, such suspension being up to the sum of those benefits.

30 The answer to the first question must therefore be that the decision by a person employed in a consular post to opt, in accordance with Article 16(2), first sentence, of Regulation No 1408/71, to be subject to the social security legislation of the sending Member State of which he is a national does not have the effect that his spouse may no longer claim a social security advantage which, irrespective of the social cover of her spouse, is guaranteed to her by the legislation of the Member State in which she resides.

The second question

31 In view of the reply to the first question, the second question no longer serves any purpose.

Costs

32 The costs incurred by the Finnish Government and the Commission, 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 (Fifth Chamber),

in answer to the questions referred to it by the Landessozialgericht Niedersachsen by order of 22 May 1997, hereby rules:

The decision by a person employed in a consular post to opt, in accordance with Article 16(2), first sentence, of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the

Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, to be subject to the social security legislation of the sending Member State of which he is a national does not have the effect that his spouse may no longer claim a social security advantage which, irrespective of the social cover of her spouse, is guaranteed to her by the legislation of the Member State in which she resides.

Jann Gulmann Edward

Sevón Wathelet

Delivered in open court in Luxembourg on 3 June 1999.

R. Grass J.-P. Puissochet

Registrar President of the Fifth Chamber