# JUDGMENT OF THE COURT (Fifth Chamber)
5 March 1998 *

In Case C-194/96,

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

**Hilmar Kulzer**

and

**Freistaat Bayern**

on the interpretation of Articles 2(3), 73 and 77 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1), then by Council Regulation (EEC) No 1247/92 of 30 April 1992 (OJ 1992 L 136, p. 1),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, J. C. Moitinho de Almeida, D. A. O. Edward (Rapporteur), J.-P. Puissochet and P. Jann, Judges,

Advocate General: N. Fennelly,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Mr Kulzer, by Michael Kaplitz, Rechtsanwalt, Schwandorf,

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

having regard to the Report for the Hearing,

after hearing the oral observations of the Commission at the hearing on 16 September 1997,

after hearing the Opinion of the Advocate General at the sitting on 23 October 1997,

gives the following

## Judgment

1 By order of 30 April 1996, received at the Court on 10 June 1996, the Bundessozialgericht (Federal Social Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty two questions on the interpretation of

Articles 2(3), 73 and 77 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 (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1), then by Council Regulation (EEC) No 1247/92 of 30 April 1992 (OJ 1992 L 136, p. 1) (hereinafter 'the Regulation').

2 Those questions were raised in proceedings between Mr Kulzer and Freistaat Bayern (Free State of Bavaria) concerning the grant of an allowance in respect of his dependent child.

## Community law

3 The fourth and fifth recitals in the preamble to Regulation No 1408/71 in its original form (OJ, English Special Edition, 1971 (II), p. 416) are worded as follows:

'... the considerable differences existing between national legislations as regards the persons to whom they apply make it preferable to establish the principle that the Regulation applies to all nationals of Member States insured under social security schemes for employed persons;

... the provisions for co-ordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should, to this end, contribute towards the improvement of their standard of living and conditions of employment, by guaranteeing within the Community firstly equality of treatment for all nationals of Member States under the various national legislations and secondly social security benefits for workers and their dependents regardless of their place of employment or of residence'.

4 Article 1(a) of the Regulation states that, for the purposes of the Regulation:

'(a) "employed person" and "self-employed person" mean respectively:

(i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population, if such person:

— can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed, or,

— failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons, or under a scheme referred to in (iii), either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I;

(iii) any person who is compulsorily insured for several of the contingencies covered by the branches dealt with in this Regulation, under a standard social security scheme for the whole rural population in accordance with the criteria laid down in Annex I;

(iv) any person who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in this Regulation, under a social security scheme of a Member State for employed or self-employed persons or for all residents or for certain categories of residents:

— if such person carries out an activity as an employed or self-employed person, or

— if such person has previously been compulsorily insured for the same contingency under a scheme for employed or self-employed persons of the same Member State'.

5 The first subparagraph of Article 1(j) provides that '"legislation" means in respect of each Member State statutes, regulations and other provisions and all other implementing measures, present or future, relating to the branches and schemes of social security covered by Article 4(1) and (2) or those special non-contributory benefits covered by Article 4(2a)'.

6 Article 2(1) and (3) states:

'1. 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.

...

3. This Regulation shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this Regulation applies.'

7 Article 4(4) provides:

'4. This Regulation shall not apply to social and medical assistance, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants and persons treated as such.'

8 Article 73 provides that an employed or self-employed person subject to the legislation of a Member State is, in principle, to be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for in the legislation of the former State, as if they were residing in that State.

9 Article 77(2)(a) provides:

'2. Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children are residing:

(a) to a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension'.

10 Point I. C (Germany) of Annex I is worded as follows:

'If the competent institution for granting family benefits in accordance with Chapter 7 of Title III of the Regulation is a German institution, then within the meaning of Article 1(a)(ii) of the Regulation:

(a) "employed person" means any person compulsorily insured against unemployment or any person who, as a result of such insurance, obtains cash benefits under sickness insurance or comparable benefits;

(b) "self-employed person" means any person pursuing self-employment who is bound:

— to join, or pay contributions in respect of, an old-age insurance within a scheme for self-employed persons, or

— to join a scheme within the framework of compulsory pension insurance.'

## German legislation

11 Paragraph 1(1)(1) of the Bundeskindergeldgesetz of 14 April 1964, as amended on 21 January 1986 (Federal Law on Child Allowance, *Bundesgesetzblatt* I, p. 222; hereinafter 'the BKGG'), provides that persons domiciled or ordinarily resident in

Germany are to be entitled to allowances in respect of their dependent children and of persons treated as such by virtue of Paragraph 2(1).

12 Paragraph 2(5) of the BKGG states that children who are neither domiciled nor ordinarily resident in Germany are not to be taken into account for the purposes of calculating child allowance.

## The main proceedings

13 Mr Kulzer is a German national residing in Germany who receives, as a retired police officer, a pension from Freistaat Bayern. He is the father of Stefanie who was born in 1974 and who from 1983 lived in France with her mother, a French national, from whom Mr Kulzer was divorced. After the death of her mother in 1987, Stefanie continued to live in France with her French grandparents. She went to school there and, during the school holidays, regularly visited her father, who continued to meet the costs of her education and subsistence. Mr Kulzer made a declaration of second residence to the German authorities on behalf of his daughter. The French authorities never paid him any child allowance.

14 In October 1988 Mr Kulzer applied to Freistaat Bayern for child allowance in respect of his daughter Stefanie under the BKGG. That application and his subsequent objection were rejected on 27 July 1989 and 5 December 1989 respectively.

15 After bringing an unsuccessful action against those decisions Mr Kulzer appealed to the Landessozialgericht (Higher Social Court), which upheld the judgment at first instance on the ground that his daughter was living in France. It held that neither the declaration of second residence made by Mr Kulzer nor his daughter's regular visits during the school holidays could be considered to satisfy the

residence condition laid down by the BKGG. Nor could Mr Kulzer rely on Article 73 of the Regulation because, being retired, he was neither an employed or self-employed person within the meaning of Article 1 thereof nor a civil servant within the meaning of Article 2(3). Furthermore, Article 77(2) of the Regulation could not apply because payment of child allowance under the BKGG was not linked in any way to receipt of a pension.

16 Mr Kulzer then appealed against that judgment to the Bundessozialgericht on a point of law. Before that court he contends in particular that, as a retired civil servant, he is also entitled, by virtue of Article 73 of the Regulation, to child allowance paid under the BKGG.

17 In those circumstances the Bundessozialgericht decided to stay the proceedings and refer the following two questions to the Court of Justice for a preliminary ruling:

'1. (a) Does Regulation (EEC) No 1408/71, in particular Article 73 thereof, apply if the child in respect of whom family benefits are sought, but not the person entitled to benefits himself or herself (in particular an employed or self-employed person), has exercised the right to freedom of movement within the European Community?

(b) Is it relevant in that respect whether the other parent moved with the child to another Member State and pursued an activity there as an employed or self-employed person until his or her death?

2. If Question 1 is answered in the affirmative, is a retired police officer a civil servant within the meaning of Article 2(3) of Regulation No 1408/71?'

18 It is apparent from the order for reference that this case raises two questions, one relating to Article 73 of the Regulation and the other to Article 77.

## The question relating to Article 73 of the Regulation

19 First, the national court essentially asks whether Article 73 of the Regulation, read in conjunction with Point I. C of Annex I thereto, is to be interpreted, for the purpose of the payment of child allowance under German legislation, as applying to a national of that Member State who under its legislation receives an old-age benefit as a retired civil servant, where that person has worked only in the Member State of which he is a national and his dependent child has moved within the Community with his former spouse.

20 Subsidiarily, the national court asks the Court whether in such a case it is relevant that the former spouse of the person concerned pursued, in the Member State to which the former spouse moved, an activity as an employed or self-employed person within the meaning of Article 1(a) of the Regulation.

21 In order to answer those questions it is necessary first to examine whether a person, such as the plaintiff in the main proceedings, who is a retired civil servant and has worked only in the State of which he is a national, is covered by the Regulation where his dependent child has moved within the Community with his former spouse.

22 The persons covered by the Regulation are defined by Article 2, which forms part of Title I, entitled 'General provisions'.

23 Under Article 2(1), the Regulation is to apply, *inter alia*, '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'.

24 The Court held in Case 182/78 *Algemeen Ziekenfonds Drenthe-Plattenland* v *Pierik* [1979] ECR 1977, at paragraph 4, that the term 'worker' was general in its scope and covered any person, whether in gainful occupation or not, who qualified as a person insured under the social security legislation of one or more Member States. It followed that, even if they were not in gainful occupation, pensioners entitled to draw pensions under the legislation of one or more Member States came within the provisions of the Regulation concerning 'workers' by virtue of their insurance under a social security scheme, unless they were subject to special provisions.

25 Article 2(3) provides that the Regulation is also to apply to civil servants where they are or have been subject to the legislation of a Member State to which the Regulation applies. Under the scheme of the Treaty, civil servants are regarded as employed persons (see Case C-71/93 *Van Poucke* v *Rijksinstituut voor de Sociale Verzekeringen der Zelfstandigen* [1994] ECR I-1101, paragraph 17).

26 For the same reasons which led the Court to hold in *Algemeen Ziekenfonds Drenthe-Plattenland* v *Pierik* that the term 'worker' also covered retired workers, the term 'civil servant', which appears in a provision of general scope defining the persons falling within the Regulation, must be construed as covering retired civil servants who no longer pursue a professional or trade activity where they are, or have been, subject to the legislation of a Member State to which the Regulation applies.

27 As regards the fact that the person to whom the national court's question refers never himself moved within the Community, it should first be noted that the fourth recital in the preamble to the Regulation in its original form states that 'the

considerable differences existing between national legislations as regards the persons to whom they apply make it preferable to establish the principle that the Regulation applies to all nationals of Member States insured under social security schemes for employed persons'.

28 Furthermore, according to Article 1(a) of the Regulation the terms 'employed person' and 'self-employed person' refer to 'any person', without qualification, who is insured under one of the social security schemes referred to in that article for the contingencies and on the conditions mentioned in that provision (see, to that effect, Case C-2/89 *Bestuur van de Sociale Verzekeringsbank* v *Kits van Heijningen* [1990] ECR I-1755, paragraph 9). Likewise, under Article 2(1) and (3) the Regulation applies to employed or self-employed persons and to civil servants who are or have been subject to the legislation of one Member State only.

29 Next, the Court held in Case 44/65 *Hessische Knappschaft* v *Singer* [1965] ECR 965, at pp. 970 and 971, that Article 52 of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (Journal Officiel 1958, p. 561) applied to any person who was in receipt of benefit under the legislation of a Member State and that the concept of 'worker' was thus not limited solely to migrant workers *stricto sensu* or solely to workers required to move for the purposes of their employment.

30 Finally, according to the fifth recital in the preamble to Regulation No 1408/71 in its original form, the provisions which the Regulation lays down for coordination of national social security legislation also apply to circumstances where members of the worker's family move within the Community.

31 It must accordingly be held that a person, such as the plaintiff in the main proceedings, who is a retired civil servant and has worked only in the State of which that

person is a national, is covered by the Regulation where his dependent child has moved within the Community with his former spouse, if that retired person is, or has been, subject to the legislation of a Member State to which the Regulation applies.

32 It is thus unnecessary to consider whether it is relevant that the former spouse of the plaintiff in the main proceedings pursued an activity as an employed or self-employed person after she moved within the Community.

33 The next question is therefore whether a person such as the plaintiff in the main proceedings may rely on Article 73 of the Regulation in order to receive child allowance provided for by German law.

34 Although Article 73 does not expressly refer to civil servants, the situation of such a person must in principle be treated in the same way as that of an employed person to whom Article 1(a) of the Regulation applies since, as is apparent from paragraph 25 of this judgment, civil servants are regarded, under the scheme of the Treaty, as employed persons.

35 The term 'employed person', which appears in Article 73 of the Regulation, is defined in Article 1(a). However, that definition is displaced by the definition in Point I. C of Annex I to the Regulation when the competent institution for granting family benefits is, in accordance with Chapter 7 of Title III of the Regulation, a German institution.

36 It appears from the actual wording of that annex, to which Article 1(a)(ii) of the Regulation refers, that only workers compulsorily insured under one of the schemes mentioned therein are entitled to German family allowances in accordance with Chapter 7 of Title III of the Regulation (Case C-266/95 *Merino García* v *Bundesanstalt für Arbeit* [1997] ECR I-3279, paragraph 24).

37 Accordingly, to allow a retired civil servant, such as the plaintiff in the main proceedings, to rely on Article 73 in order to receive German family allowances on the ground that the situation of civil servants must generally be treated in the same way as that of employed persons would involve disregarding the terms of Annex I.

38 In the light of the foregoing, the reply to the question relating to Article 73 of the Regulation must be that that provision, read in conjunction with Point I. C of Annex I to the Regulation, is to be interpreted, for the purpose of the payment of child allowance under German legislation, as not applying to a national of that Member State who receives, under its legislation, an old-age benefit as a retired civil servant, where that person has worked only in the Member State of which he is a national and his dependent child has moved within the Community with his former spouse.

## The question relating to Article 77 of the Regulation

39 In view of the circumstances in the main proceedings and in order to give the national court as complete and useful an answer as possible, it is appropriate to consider whether Article 77(2)(a) of the Regulation is to be interpreted as covering, as the Commission maintains, the situation of a person, such as the plaintiff in the main proceedings, who draws a pension under a special scheme for civil servants and persons treated as such.

40 The Court held in Case 129/78 *Sociale Verzekeringsbank Amsterdam* v *Lohmann* [1979] ECR 853 that the term 'legislation' used in Article 77(2)(a) of the Regulation has the meaning stated in Article 1(j) thereof. That provision therefore does not cover the statutes, regulations or other provisions or measures relating to the categories of benefits referred to in Article 4(4) of the Regulation which include, in particular, special schemes for civil servants and persons treated as such.

41 That conclusion does not, however, preclude a person drawing a pension under a special scheme for civil servants and persons treated as such from relying on Article 77(2)(a) of the Regulation if he also receives another old-age benefit covered by that provision. However, the documents before the Court do not disclose whether that is so in the case of the plaintiff in the main proceedings.

42 The answer to the question relating to Article 77(2)(a) of the Regulation must therefore be that that provision is to be interpreted as not covering the situation of a person who draws a pension only under a special scheme for civil servants and persons treated as such.

## Costs

43 The costs incurred by the Commission of the European Communities, which has 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 Bundessozialgericht by order of 30 April 1996, hereby rules:

1. **Article 73 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 (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989, then by Council Regulation (EEC) No 1247/92 of 30 April 1992, read in conjunction with Point I. C of Annex I to the same regulation, is to be interpreted, for the purpose of payment of child allowance under German legislation, as not applying to a national of that Member State who receives, under its legislation, an old-age benefit as a retired civil servant, where that person has worked only in the Member State of which he is a national and his dependent child has moved within the Community with his former spouse.**

2. **Article 77(2)(a) of Regulation No 1408/71, as amended, is to be interpreted as not covering the situation of a person who draws a pension only under a special scheme for civil servants and persons treated as such.**

Gulmann Moitinho de Almeida Edward

Puissochet Jann

Delivered in open court in Luxembourg on 5 March 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber