Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

21 February 2013 *

(Social security — Regulation (EEC) No 1408/71 — Articles 72, 78(2)(b) and 79(1)(a) — Family benefits for orphans — Aggregation of periods of insurance and employment — Periods completed by the surviving parent in another Member State — Not taken into account)

In Case C-619/11,

REQUEST for a preliminary ruling under Article 267 TFEU from the tribunal du travail de Bruxelles (Belgium), made by decision of 15 November 2011, received at the Court on 30 November 2011, in the proceedings

Patricia Dumont de Chassart

v

Office national d'allocations familiales pour travailleurs salariés (ONAFTS),

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, E. Jarašiūnas, A. Ó Caoimh (Rapporteur), C. Toader and C.G. Fernlund, Judges,

Advocate General: P. Mengozzi,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 7 November 2012,

after considering the observations submitted on behalf of:

— Mrs Dumont de Chassart, by F. Hachez and T. Delahaye, avocats,

— the Belgian Government, by L. Van den Broeck and M. Jacobs, acting as Agents, and J. Vanden Eynde and L. Delmotte, avocats,

— the Council of the European Union, by M. Sitbon, M. Veiga and S. Cook, acting as Agents,

— the European Commission, by V. Kreuschitz and G. Rozet, acting as Agents.

after hearing the Opinion of the Advocate General at the sitting on 13 December 2012,

gives the following

* Language of the case: French.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Articles 72, 78(2)(b) and 79(1)(a) of Regulation (EEC) No 1408/71 of the Council 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended by Council Regulation (EC) No 1399/1999 of 29 April 1999 (OJ 1999 L 164, p. 1) ('Regulation No 1408/71').

2 The request has been made in proceedings between Mrs Dumont de Chassart and the Office national d'allocations familiales pour travailleurs salaries ('ONAFTS') concerning the latter's refusal to grant her family benefits for orphans in relation to her son.

Legal context

European Union legislation

3 Article 1(a) of Regulation No 1408/71 provides that, for the purposes of the regulation, the term 'employed person' means, inter alia, 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 persons.

4 Article 2 of the regulation, entitled 'Persons covered', provides:

'1. This Regulation shall apply to employed or self-employed persons and to students 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.

2. This Regulation shall apply to the survivors of employed or self-employed persons and of students who have been subject to the legislation of one or more Member States, irrespective of the nationality of such persons, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States.'

5 Article 4(1) thereof states:

'This Regulation shall apply to all legislation concerning the following branches of social security:

…

(c) old-age benefits;

…

(h) family benefits.'

6 In Chapter 7, concerning 'Family benefits', of Title III of Regulation No 1408/71, Article 72, which is entitled 'Aggregation of periods of insurance, employment or self-employment', provides:

'Where the legislation of a Member State makes acquisition of the right to benefits conditional upon completion of periods of insurance, employment or self-employment, the competent institution of that State shall take into account for this purpose, to the extent necessary, periods of insurance, employment or self-employment completed in any other Member State, as if they were periods completed under the legislation which it administers.'

7 Chapter 8 of Title III of Regulation No 1408/71, concerning 'Benefits for dependent children of pensioners and for orphans', includes Article 78, entitled 'Orphans', which is worded as follows:

'1. The term "benefits", for the purposes of this Article, means family allowances and, where appropriate, supplementary or special allowances for orphans.

2. Orphans' benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the orphan or the natural or legal person actually maintaining him is resident:

(a) for the orphan of a deceased employed or self-employed person who was subject to the legislation of one Member State only in accordance with the legislation of that State;

(b) for the orphan of a deceased employed or self-employed person who was subject to the legislation of several Member States:

(i) in accordance with the legislation of the Member State in whose territory the orphan resides provided that, taking into account, where appropriate, Article 79(1)(a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State;

…'

8 Still in Chapter 8, Article 79, entitled 'Provisions common to benefits for dependent children of pensioners and for orphans', is worded as follows:

'1. Benefits, within the meaning of Articles 77, 78 and 78a shall be provided in accordance with the legislation determined by applying the provisions of those Articles by the institution responsible for administering such legislation and at its expense as if the pensioner or the deceased had been subject only to the legislation of the competent State.

However,

(a) if that legislation provides that the acquisition, retention or recovery of the right to benefits shall be dependent on the length of periods of insurance, employment, self-employment or residence such length shall be determined taking into account, where appropriate, the provisions of Article 45 or, as the case may be, Article 72;

…'

9 Annex VI to the regulation, which relates to '[special procedures for applying the legislations of certain member states], states':

'A. [Belgium]

…

7. Pursuant to Articles 72 and 79(1)(a) of the Regulation, account shall be taken of periods of employment and/or periods of insurance completed under the legislation of another Member State where entitlement to benefit under Belgian legislation is subject to the condition that, for a specified previous period, the qualifying conditions for family benefits in the framework of the scheme for employment persons have been met.

…'

10 Article 15 of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 159), as amended and updated by Regulation No 118/97, which sets out the general rules for the aggregation of periods, states inter alia:

'1. In the cases referred to in Articles 18(1), 38, 45(1) to (3), 64, and 67(1) and (2) of … Regulation [No 1408/71], aggregation of periods shall be effected in accordance with the following rules:

(a) To periods of insurance or residence completed under the legislation of one Member State shall be added periods of insurance or residence completed under the legislation of any other Member State, to the extent that this is necessary to have recourse thereto in order to supplement periods of insurance or residence completed under the legislation of the first Member State for the purpose of acquiring, retaining, or recovering the rights to benefits, provided that such periods of insurance or residence do not overlap. ...

…'

Belgian legislation

11 Article 56a(1) of the laws consolidated on 19 December 1939 on family allowances for employed persons ('the consolidated laws') provides that the family allowance is to be allocated at the specified rates only to orphans where, at the time of death of one of his or her parents, either the deceased parent or the surviving parent fulfilled, during the 12 months immediately preceding the death, the conditions for claiming at least six flat-rate monthly payments of the allowance under those consolidated laws.

The dispute in the main proceedings and the question referred for a preliminary ruling

12 Mrs Dumont de Chassart, a Belgian national, is the widow of Mr Descampe, who was also a Belgian national. The couple had a son, Diego Descampe, also a Belgian citizen, who was born in France on 23 January 2000.

13 It is apparent from the file before the Court of Justice that Mrs Dumont de Chassart was in paid employment in France from 28 September 1993 to 31 August 2008. Mr Descampe, for his part, was in paid employment in both Belgium (during the periods between 1968 and 1976 and between 1987 and 1998), and in France (in the period between 1989 and 2002). From that point onwards, Mr Descampe had stopped working and lived in France, where he enjoyed 'early retirement' financed entirely by his own savings and received no benefits.

14 Mr Descampe passed away on 25 April 2008 in France.

15 On 31 August 2008, Mrs Dumont de Chassart and her son moved to Belgium, where, after working for about a month, Mrs Dumont de Chassart became unemployed.

16 On 13 October 2008, Mrs Dumont de Chassart applied to ONAFTS for a family benefit for orphans in respect of her son.

17 On 4 February 2009, she also applied to ONAFTS for a supplementary allowance for single-parent families from 1 September 2008.

18 On 9 March 2009, ONAFTS informed Mrs Dumont de Chassart that she was to be granted the family benefits from 1 September 2008 on the basis of the professional activity which she had pursued in Belgium.

19 On 6 April 2009, ONAFTS further informed Mrs Dumont de Chassart that she had also been granted a supplementary allowance for single-parent families from 1 October 2008.

20 However, on 20 November 2009, ONAFTS decided to deny the applicant the family allowance for orphans on the ground that, during the 12 months immediately preceding the death of Mr Descampe, the latter had not fulfilled the conditions for claiming six flat-rate monthly payments of the allowance under Article 56a(1) of the consolidated laws.

21 On 5 February 2010, Mrs Dumont de Chassart brought an action before the tribunal du travail de Bruxelles to challenge that refusal, claiming that ONAFTS should have granted her the family allowance for orphans by taking account of the periods of insurance which she had completed in France prior to her husband's death.

22 In the order for reference, the national court points out that, in accordance with Article 78(2)(b) of Regulation No 1408/71, the applicable national law is that of the place of residence of the orphan and that, consequently, Belgian law applied to Mrs Dumont de Chassart as of 1 September 2008. The national court points out that, according to Article 56a(1) of the consolidated laws, either the situation of the deceased parent or that of the surviving parent may be relied upon as the basis of the application for family benefits for orphans. In the case in the main proceedings, however, such an application could not be based on the situation of the deceased parent because, during the 12 months immediately preceding his death, Mr Descampe had not fulfilled the conditions for at least six flat-rate monthly payments of the allowance under the consolidated laws. The situation of the surviving parent, Mrs Dumont de Chassart, could be relied upon as the basis for her application only if her periods of insurance and employment in France could be treated as periods of insurance and employment in Belgium.

23 According to the national court, however, in the present case, the application of the rules equating periods, provided for in Article 72 of Regulation No 1408/71, is precluded by Article 79(1) of that regulation. In its view, the latter provision, which contains a reference to Article 72, relates only, as submitted by ONAFTS in the case in the main proceedings, to periods of insurance and employment completed by the deceased employed person exclusively and not those completed by the surviving employed person. The *scope ratione personae* of Article 79(1) of Regulation No 1408/71 and, consequently, of the reference it contains to Article 72 of the regulation, is thus more restricted than that of Article 56a(1) of the consolidated laws.

24 The tribunal du travail de Bruxelles asks whether that limitation of the scope of Article 56a(1) of the consolidated laws by Article 79(1) of Regulation No 1408/71 constitutes an infringement of the principles of equal treatment and non-discrimination laid down in European Union law. In that regard, that court harbours doubts in particular as to the distinction to be made between children whose parents have never left Belgian territory with a view to pursuing a professional activity in another Member State and children whose parents (European Union citizens) have resided in another Member State in which, during the reference period which is relevant for the purposes of the Belgian legislation, the surviving parent worked, whereas the deceased parent did not pursue any professional activity. In respect of the first category of children, the surviving parent, who worked in Belgium

during the reference period, could rely on the periods of insurance and employment which he or she personally completed in Belgium, in addition to the periods of insurance and employment completed by the deceased parent, whereas in respect of the second category of children, the surviving parent could not rely in Belgium on the periods completed in another Member State.

25 In those circumstances, the tribunal du travail de Bruxelles decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does Article 79(1) of … Regulation … No 1408/71 … breach the general principles of equality and non-discrimination, enshrined, inter alia, in Article 14 of the [European] Convention for the Protection of Human Rights and Fundamental Freedoms, signed at Rome on 4 November 1950, read, where appropriate, in conjunction with Articles 17, 39 and/or 43 of the consolidated version of the [EC] Treaty…, when it is interpreted as allowing the rules equating periods of insurance, employment or self-employment laid down in Article 72 of [that regulation] to apply to the deceased parent alone with the consequence that Article [56a(1) of the consolidated laws] excludes, in the case of the surviving parent, irrespective of that parent's nationality provided he or she is a national of a Member State or provided he or she comes within the scope *ratione personae* of [that regulation], who has worked in another country of the European Union during the 12-month period referred to in Article [56a(1) of the consolidated laws], the opportunity for that parent to provide evidence that he or she fulfils the condition that, in his or her capacity as claimant for the purposes of Article 51(3)(1) of the [those laws], he or she could have received six flat-rate monthly benefit payments during the 12 months preceding the death, whereas the surviving parent, whether he or she is of Belgian nationality or is a national of another Member State of the European Union, who has worked exclusively in Belgium during the 12-month period referred to in [Article 56a(1) of the consolidated laws], in some cases because he or she has never left Belgian territory, is allowed to adduce such evidence?'

Consideration of the question referred

26 By its question the national court asks, in essence, whether Articles 72, 78(2)(b) and point (a) of the second subparagraph of 79(1) of Regulation No 1408/71 must be interpreted as permitting account to be taken of, for the aggregation of periods of insurance and employment necessary in a Member State to gain entitlement to benefits for orphans, only of periods completed solely by the deceased parent in another Member State, excluding those completed by the surviving parent. If that is the case, the national court asks whether those provisions of Regulation No 1408/71 are compatible with the general principle of equal treatment and non-discrimination.

The applicability of Regulation No 1408/71

27 First of all, it should be noted at the outset that, contrary to what the Belgian Government has submitted in its written observations, the dependants of a deceased parent, such as Mr Descampe, cannot be deprived of the right to rely on the application of Regulation No 1408/71 on the ground that that parent, at the time of his death, was no longer insured under any of the branches of social security listed under Article 4(1) of that regulation, and thus lost his status of 'employed person' within the meaning of Article 1(a) of that regulation.

28 Under Article 2 of Regulation No 1408/71, which determines who falls within the scope *ratione personae* of the regulation, the latter applies to the survivors of employed persons who 'have been subject' to the social security scheme of one or more Member States for the purposes of Article 4(1) of that regulation (see, to that effect, Case 115/77 *Laumann* [1978] ECR 805, paragraph 5, and Case C-131/96 *Mora Romero* [1997] ECR I-3659, paragraph 21).

29 In the case in the main proceedings, it is established that Mr Descampe, who pursued a professional activity in both Belgium and France between 1968 and 2002, was affiliated to the social security schemes in both of those Member States. Thus, it is apparent from the file before the Court of Justice that, if Mr Descampe had not passed away shortly before reaching the age of retirement, he would have been entitled, in particular, to an old-age pension, for the purposes of Article 4(1)(c) of Regulation No 1408/71, in each of those Member States.

30 In any event, it is not disputed that, both before and after Mr Descampe's death, Mrs Dumont de Chassart, who is seeking benefits for orphans in the case in the main proceedings, was insured under the social security scheme of a Member State, for the purposes of Article 4(1) of Regulation No 1408/71, with the result that she is an 'employed person' within the meaning of Article 1(a) of that regulation, and that, consequently, she is covered by that regulation, by virtue of Article 2 thereof.

31 Therefore, the Court finds that a situation such as the one at issue in the main proceedings falls within the scope *ratione personae* of Regulation No 1408/71.

The interpretation of Articles 72, 78(2)(b) and point (a) of the second subparagraph of Article 79(1) of Regulation No 1408/71

32 In so far as concerns the right to benefits for orphans, it should be noted that the rules laid down in Article 78 of Regulation No 1408/71 seek to determine the Member State whose legislation governs the granting of those benefits, which in principle are granted in accordance with the legislation of that Member State alone. It is clear from Article 78(2)(b)(i) that, where the deceased parent was subject to the legislation of several Member States, those benefits are to be granted in accordance with the legislation of the Member State in whose territory the orphan of the deceased employed person resides. The Member State of residence is thus specified by that provision as having sole competence to grant the benefits in question (see, inter alia, Case C-59/95 *Bastos Moriana and Others* [1997] ECR I-1071, paragraphs 15 and 18, and Case C-225/10 *Pérez García and Others* [2011] ECR I-10111, paragraph 39).

33 Pursuant to the first subparagraph of Article 79(1) of Regulation No 1408/71, the Member State concerned is to provide benefits in accordance with its own national legislation 'as if' the deceased employed person had been subject only to that legislation.

34 The Belgian Government submits that those provisions of Regulation No 1408/71 permit account to be taken, for the aggregation of periods of insurance and employment necessary to acquire the right to benefits for orphans, only of periods completed by the deceased parent in so far as that parent had already accumulated some periods of insurance or employment in the Member State requested to grant the benefits. The result is that, in the case in the main proceedings, the periods of insurance and employment completed by Mrs Dumont de Chassart in France during the year preceding the death of her husband cannot, in the view of the Belgian Government, be taken into consideration for the purposes of acquiring the right to benefits for orphans provided for under Belgian legislation.

35 In that regard, the Court of Justice notes that it is true that Article 78(2) of Regulation No 1408/71 governs only, in accordance with the very wording of points (a) and (b) of the first subparagraph thereof, the right to benefits for 'the orphan of a deceased employed … person'. That provision thus does not apply, as the Court has held, to the case of children who have become orphans as a result of the death of a parent who was not himself an employed person (Case 1/88 *Baldi* [1989] ECR 667, paragraph 15).

36 It is also true that, similarly, the wording of the first subparagraph of Article 79(1) of Regulation No 1408/71, in relation to the payment of benefits, refers only to the situation of the 'deceased'.

37 However, the Court notes that, as is apparent from paragraphs 32 and 33 above, Articles 78(2) and the first subparagraph of Article 79(1) of Regulation No 1408/71 merely set out a 'conflict rule', the purpose of which is simply to determine, in the case of orphans whose deceased parent was an employed person, which legislation is applicable and which institution is required to pay the benefits provided for under that legislation.

38 Those provisions are intended not only to prevent the concurrent application of a number of national legislative systems and the complications which might ensue, but also to ensure that persons covered by that regulation are not left without social security cover because there is no legislation which is applicable to them (see, by analogy, Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 28).

39 By contrast, as such, those provisions are not intended to lay down the conditions creating the right to benefits for orphans. It is for the legislation of each Member State to lay down those conditions (see Case C-106/11 *Bakker* [2012] ECR, paragraph 32 and the case-law cited).

40 Regulation No 1408/71 does not set up a common scheme of social security, but allows different national social security schemes to exist and its sole objective is to ensure the coordination of those schemes. It thus allows different schemes to continue to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by European Union law (Case C-331/06 *Chuck* [2008] ECR I-1957, paragraph 27).

41 In the absence of harmonisation at the European Union level, each Member State retains the power to determine in its legislation, in compliance with European Union law, the conditions pursuant to which benefits may be granted under a social security scheme (see, to that effect and inter alia, Case C-345/09 *van Delft and Others* [2010] ECR I-9879, paragraphs 84 and 99, and Case C-388/09 *da Silva Martins* [2011] ECR I-5737, paragraph 71 and the case-law cited).

42 The result is that, for the purposes of Article 78(2) and the first subparagraph of Article 79(1) of Regulation No 1408/71, the status of 'deceased employed person' constitutes merely a connecting factor which determines, first, whether those provisions are applicable and, second, in conjunction with the orphan's place of residence, which national legislation is applicable

43 In the present case, it is established that the connecting factor set out in Article 78(2)(b)(i) of Regulation No 1408/71 leads to the application of Belgian law, namely Article 56a(1) of the consolidated laws. Pursuant to the first subparagraph of Article 79(1) of Regulation No 1408/71, it is thus for the competent Belgian authorities to pay the benefits concerned in accordance with Belgian law, as if Mr Descampe had been subject to that legislation alone.

44 Once, pursuant to those provisions, the Belgian legislation has, first of all, been designated as the applicable legislation pursuant to which benefits for orphans are to be allocated, and thus also the competent Belgian authorities responsible for the payment of those benefits, the existence of a right to benefits for orphans then depends, in accordance with the case-law set out in paragraphs 39 to 41 above, on the content of the applicable Belgian legislation, namely Article 56a(1) of the consolidated laws.

45 In that regard, it is not disputed that that provision of national law authorises, in order to determine the existence of a right to benefits for orphans, account to be taken of periods of insurance and employment completed by both the deceased parent and the surviving parent.

46 In those circumstances, pursuant to the rule laid down in point (a) of the second subparagraph of Article 79(1) of Regulation No 1408/71, the competent Belgian authorities must, when determining, in the case in the main proceedings, whether a right to benefits for orphans exists, take account, in

accordance with the principle of aggregation of periods of insurance and employment laid down in Article 72 of the regulation, to which point (a) of the second subparagraph of Article 79(1) refers, of periods of insurance and employment completed by the surviving parent in another Member State.

47 That provision, which qualifies the substance of the applicable national legislation by providing, in favour of the orphan of the deceased employed person, for the principle of aggregation of periods of insurance and employment, in no way restricts the scope *ratione personae* of that national legislation. Moreover, the Court points out that that provision makes no reference to the notion of 'deceased employed person'.

48 However, the Belgian Government submits that the taking into account by the competent Belgian authorities, for the purposes of their aggregation, of periods of employment completed in another Member State requires a minimum period of employment to have taken place in Belgium during the reference period. Article 79 of Regulation No 1408/71 can thus be interpreted as requiring those authorities to take account of the activity pursued by Mrs Dumont de Chassart in France only if that activity makes it possible to supplement a period of insurance or employment completed in Belgium. However, in the present case, neither Mr Descampe nor Mrs Dumont de Chassart could, in the view of the Belgian Government, rely on the supplementation of such a period in Belgium during the year preceding Mr Descampe's death.

49 That interpretation cannot be upheld.

50 As the Court has already held (Case C-257/10 *Bergström* [2011] ECR I-13227, paragraph 44), a Member State which is competent to award a family benefit cannot demand that an insurance period must have been completed in its own territory in addition to periods of insurance and employment completed in another Member State.

51 The wording of both Article 72 of Regulation No 1408/71 and that of point 7 of Annex VI A to that regulation, which concerns the granting of benefits for orphans in Belgium, is completely unambiguous in that regard. Article 72 requires that account be taken, for the purposes of aggregation, of 'periods of insurance, employment or self-employment completed in any other Member State', as if they were periods completed under the legislation of the competent authorities, whereas under Annex VI A 'account shall be taken' of periods of insurance and periods of employment completed under the legislation of another Member State (see, to that effect, *Bergström*, paragraph 41).

52 Moreover, it should be borne in mind that Regulation No 1408/71 was adopted on the basis of Article 51 of the EEC Treaty (later Article 51 of the EC Treaty and, subsequently, after amendment, Article 42 EC, now Article 48 TFEU), which empowered the Council of the European Union to adopt such measures in the field of social security as were necessary to provide freedom of movement for workers, making arrangements to that end to secure the aggregation for migrant workers and their dependants, for the purposes of acquiring and retaining the right to benefits and of calculating the amount of benefits, of 'all periods' taken into account under the laws of the several countries (*Bergström*, paragraph 42).

53 That interpretation is also in line with the objective pursued by Article 48 TFEU, in the light of which the provisions of Regulation No 1408/71 must be interpreted, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers (see, inter alia, *da Silva Martins*, paragraph 70, and Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak* [2012] ECR, paragraph 53; see, to that effect, *Bergström*, paragraph 43).

54 Articles 45 TFEU to 48 TFEU, and Regulation No 1408/71, adopted to implement them, are intended in particular to prevent the situation in which a worker who has exercised his right of free movement is treated, without objective justification, less favourably than one who has completed his entire career in only one Member State (see, to that effect, *da Silva Martins*, paragraph 76, and *Hudzinski and Wawrzyniak*, paragraph 80).

55 However, in the present case, the refusal of a Member State to take account, when determining whether a right to benefits for orphans exits, of periods of insurance and employment completed in another Member State by an employed person, who is the national of that Member State and the surviving parent of a child of a deceased employed person, is likely to disadvantage that employed person on the sole ground that he exercised his right to freedom of movement, as guaranteed under Article 45 TFEU, and, consequently, could deter him from returning to his Member State of origin following the death of his partner by exercising his right to freedom of movement under that same provision or under Article 21 TFEU.

56 None of the arguments raised by the Belgian Government is such as to call that interpretation into question.

57 First of all, Article 15(1)(a) of Regulation No 574/72, as amended and updated by Regulation No 118/97, on which the Belgian Government bases its written observations, refers explicitly only to benefits in respect of sickness and maternity, invalidity, old age, death and unemployment. By contrast, that provision does not concern family allowances such as the benefits for orphans at issue in the main proceedings.

58 Next, the judgment in *Pérez García and Others*, relied on by the Belgian Government at the hearing, is not relevant to the outcome of the case in the main proceedings, since it does not concern the aggregation of periods of insurance and employment within the meaning of Article 72 and point (a) of the second subparagraph of Article 79(1) of Regulation No 1408/71.

59 Finally, in so far as concerns Case 110/79 *Coonan* [1980] ECR 1445, paragraph 13 and Case 70/80 *Vigier* [1981] ECR 229, paragraphs 19 and 20, also relied on at the hearing, although it is true that the Court held in those judgments that, where national legislation makes affiliation to a social security scheme conditional on prior affiliation by the person concerned to the national social security scheme, Regulation No 1408/71 does not compel Member States to treat as equivalent insurance periods completed in another Member State and those which must have been completed previously on national territory, suffice it to note that the present case does not concern the affiliation to a social security scheme, since Mrs Dumont de Chassart is affiliated to the Belgium social security scheme for employed persons.

60 It follows that Articles 72 and 79(1)(a) of Regulation No 1408/71, far from precluding, in a case such as the one in the main proceedings, account from being taken of periods of insurance and employment completed by the surviving parent of a child of a deceased employed person in another Member State, requires, on the contrary, such account to be taken where the legislation of the competent Member State provides that a right to benefits for orphans can arise not only from the deceased parent, but also the surviving parent, provided that they have the status of employed persons.

61 In those circumstances, it is not necessary to examine whether those provisions of Regulation No 1408/71 comply with the principle of equal treatment and non-discrimination.

62 In the light of all of the foregoing considerations, the answer to the question referred is that Article 72, Article 78(2)(b) and point (a) of the second subparagraph of Article 79(1) of Regulation No 1408/71 must be interpreted as meaning that, where the national legislation of a Member State provides that a right to benefits for orphans can be established by both the deceased parent and the surviving parent, provided that they have the status of employed persons, those provisions of European Union law

require that periods of insurance and employment completed by the surviving parent in another Member State be taken into account in the aggregation of the periods necessary to acquire the right to benefits in the first of those Member States. In that regard, it is not relevant that the surviving parent cannot rely on any period of insurance or employment in that Member State during the reference period laid down by that national legislation for the acquisition of that right.

Costs

63 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Article 72, Article 78(2)(b) and point (a) of the second subparagraph of Article 79(1) of Regulation (EEC) No 1408/71 of the Council 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, as amended by Council Regulation (EC) No 1399/1999 of 29 April 1999, must be interpreted as meaning that, where the national legislation of a Member State provides that a right to benefits for orphans can be established by both the deceased parent and the surviving parent, provided that they have the status of employed persons, those provisions of European Union law require that periods of insurance and employment completed by the surviving parent in another Member State be taken into account in the aggregation of the periods necessary to acquire the right to benefits in the first of those Member States. In that regard, it is not relevant that the surviving parent cannot rely on any period of insurance or employment in that Member State during the reference period laid down by that national legislation for the acquisition of that right.

[Signatures]