JUDGMENT OF THE COURT (Sixth Chamber)

24 September 2002 *

In Case C-471/99,

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

Alfredo Martínez Domínguez,

Joáquín Benítez Urbano,

Agapito Mateos Cruz,

Carmen Calvo Fernández

and

Bundesanstalt für Arbeit, Kindergeldkasse,

on the interpretation of Articles 77(2)(b), 78(2)(b) and 79(1) 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

* Language of the case: German.

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),

THE COURT (Sixth Chamber),

composed of: F. Macken, President of the Chamber, C. Gulmann (Rapporteur), R. Schintgen, V. Skouris and J.N. Cunha Rodrigues, Judges,

Advocate General: A. Tizzano,
Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— Martínez Domínguez, by A. Nicolás López, Head of the Social Affairs Section at the Spanish Consulate General in Hanover,

— Benítez Urbano, by K. von Harbou, Adviser on questions of social law at the Spanish Embassy, Bonn,

— Mateos Cruz, by Á. González Maeztu, Head of the Social Affairs Section at the Spanish Consulate General in Stuttgart,

— the German Government, by W.-D. Plessing and B. Muttelsee-Schön, acting as Agents,

— the Spanish Government, by M. López-Monís Gallego, acting as Agent,

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

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, represented by B. Muttelsee-Schön, and the Commission, represented by J. Sack, acting as Agent, at the hearing on 11 October 2001,

after hearing the Opinion of the Advocate General at the sitting on 7 February 2002,

gives the following

Judgment

1 By order of 22 November 1999, received at the Court on 9 December 1999, the Sozialgericht Nürnberg (Social Court, Nuremberg) referred to the Court for a

preliminary ruling under Article 234 EC two questions on the interpretation of Articles 77(2)(b), 78(2)(b) and 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 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, hereinafter 'the Regulation').

2 Those questions were raised in four sets of proceedings between respectively Messrs Martínez Domínguez, Benítez Urbano, Mateos Cruz and Mrs Carmen Calvo Fernández, Spanish nationals residing in Spain, and the Bundesanstalt für Arbeit, Kindergeldkasse (Federal Office for Employment, child-benefit fund, hereinafter 'the BAK'), following the rejection by it of their applications for family benefits.

Community legislation

3 Article 77 of the Regulation, under the heading 'Dependent children of pensioners', provides:

'1. The term "benefits", for the purposes of this Article, shall mean family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases.

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;

(b) to a pensioner who draws pensions under the legislation of more than one Member State:

(i) in accordance with the legislation of whichever of these States he resides in 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,

or

(ii) in other cases, in accordance with that legislation under which he has completed the longest insurance period, provided that, taking into account where appropriate Article 79(1)(a), a right to one of the benefits referred to in paragraph (i) is acquired under such legislation; if no right to benefit is acquired under such legislation, the conditions for the acquisition of such right under the legislations of the other States concerned shall be examined in decreasing order of the length of insurance periods completed under the legislation of those States.'

4 Article 78 of the Regulation, under the heading 'Orphans', provides:

'1. The term "benefits", for the purposes of this Article, means family allowances and, where appropriate, supplementary or special allowances for orphans and orphans' pensions except those granted under insurance schemes for accidents at work and occupational diseases.

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 or situated;

(a) for the orphan of a deceased worker 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 worker 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 4 is acquired under the legislation of that State,

or

(ii) in other cases, in accordance with the legislation of the Member State under which the deceased worker had completed the longest insurance period provided that, taking into account where appropriate Article 79(1)(a), the right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State; if no right is acquired under that legislation, the conditions for the acquisition of such right under the legislations of the other States in question shall be examined in decreasing order of the length of insurance periods completed under the legislation of these States.

However, the legislation of the Member State applicable in respect of provision of the benefits referred to in Article 77 for a pensioner's children shall remain applicable after the death of the said pensioner in respect of the provision of the benefits to his orphans.'

5 Article 79 of the Regulation, entitled 'Provisions common to benefits for dependent children of pensioners and for orphans', provides:

'1. Benefits, within the meaning of Articles 77 and 78, 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 worker 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 or

employment, such lengths shall be determined taking account where necessary of Articles 45 or 72 as appropriate;

...'

National legislation

6 In Spain the Real Decreto legislativo (Royal Legislative Decree) No 1/1994 of 20 June 1994 providing generally for social security (BOE No 154 of 29 June 1994) provides, for the benefit of affiliated workers and for pensioners, for the payment of an allowance for each dependent child up to the age of 18 years provided that the recipient's income does not exceed a specified ceiling. It also provides for entitlement to payment of an allowance for handicapped children with an invalidity rating of more than 65%, whatever the age of the child and with no income ceiling. However, in the case of a child over the age of 18 years that allowance is not granted if the child is in receipt of a special benefit awarded under the Ley No 13/1982 de Integración de los Minusválidos (LISMI) (Law on the social integration of handicapped persons) of 7 April 1982 (BOE No 103 of 30 April 1982), the person concerned having to opt for one or other of the benefits.

7 In Germany entitlement to family benefits is governed by the Bundeskindergeldgesetz (Federal law on family allowances), as several times amended. Until 31 December 1995 entitlement to family allowances subsisted until the child reached the age of 16 years. That age was raised to 18 years with effect from 1 January 1996. Entitlement to an allowance is extended to 27 years of age in the case of occupational training or, in the case of unemployment, until 21 years of age. In the case of children who, because of a handicap, are unable to support

themselves, there is no age-limit. Until 31 December 1995 entitlement to family allowances was not subject to income limits in respect of the first child but was so in respect of subsequent children. Since 1 January 1996 that right is no longer dependent on the income of the persons entitled.

The main proceedings and the questions submitted to the Court

The Martínez Domínguez, Benítez Urbano and Mateos Cruz cases

8 Messrs Martínez Domínguez, Benítez Urbano and Mateos Cruz worked in Germany as migrant workers. Each of them receives a pension in Spain and a pension in Germany.

9 In Germany Messrs Martínez Domínguez and Mateos Cruz receive invalidity pensions and Mr Benítez Urbano an old-age pension. However, each of them is entitled to a pension only on the basis of the inclusion of contributions paid in Spain.

10 In 1996 and 1997 the three persons concerned applied to the BAK for family allowances. Mr Martínez Domínguez sought payment of family allowances for a child of less then 18 years since he did not qualify for that benefit in Spain owing to the fact that he exceeded the income ceiling laid down in Real Decreto Legislativo No 1/1994. Mr Benítez Urbano sought family allowances for a handicapped child of more than 18 years and Mr Mateus Cruz for three children of more than 18 years undergoing training for whom he had received in Spain family benefits until the end of the quarter during which each of them had reached the age of 18 years.

11 Those applications were rejected. The claimants lodged complaints against those rejections. Those complaints were also rejected. In 1997 and 1998 the claimants challenged the rejections of their complaints before the Sozialgericht Nürnberg.

12 The BAK considers that where there is no pension entitlement based solely on German legislation, the State of residence has exclusive competence to grant the benefits at issue.

The Calvo Fernández case

13 Mrs Calvo Fernández is the widow of a Spanish national who died in 1985. Her husband had worked as a migrant worker in Germany where he had acquired entitlement to a pension under the bilateral convention on social security concluded on 4 December 1973 between the Federal Republic of Germany and the Kingdom of Spain (BGBl. 1977 II, p. 687), as amended by a protocol of 17 December 1975 (BGBl. 1977 II, p. 722, hereinafter 'the bilateral convention'). He was not entitled to family benefits in Germany.

14 Pensions for orphans who had lost their fathers were paid in Spain for the three children residing in Spain who were under 18 years of age. Pensions were also paid on the same basis in Germany under the bilateral convention even after 1 January 1986, the date of accession by the Kingdom of Spain to the European Communities, there being no entitlement to such pensions solely under German legislation.

15 In 1997 an application for family allowances submitted to the BAK by Mrs Calvo Fernández for two of her children who were over the age of 18 years and were undergoing training was rejected. The complaint against the rejection was itself rejected. Mrs Calvo Fernández brought proceedings before the Sozialgericht Nürnberg challenging the rejection of her complaint.

16 The BAK reiterates the same arguments as in the three other cases but adds that the situation of Mrs Calvo Fernández is analogous to a situation already examined by the Court in its judgment in Case C-113/96 *Gómez Rodríguez* [1998] ECR I-2461.

17 Considering that resolution of the disputes pending before it necessitated an interpretation of Community law, the Sozialgericht Nürnberg decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'1. Is Article 77(2)(b) in conjunction with Article 79(1) of Regulation (EEC) No 1408/71 to be interpreted as meaning that family allowances for the dependent children of pensioners, who acquired entitlement to a pension in a Member State not solely under the legislation of that Member State but under the coordinating provisions of European social law, must be paid as a full benefit where the pension entitlement *vis-à-vis* the State of non-residence subsists in respect of periods or arises only as from a period in respect of which there is no (or no longer any) entitlement to family benefits provided for under the legislation of the State of residence owing either to the fact that an age-limit or an income limit has been exceeded or to the fact that they were not applied for?

2. Is Article 78(2)(b) in conjunction with Article 79(1) of Regulation (EEC) No 1408/71 to be interpreted as meaning that family allowances for orphans of a deceased employee or self-employed person, to whom the legislation of several Member States applied, must be paid as a full benefit, where there is no entitlement to an orphan's pension in a Member State whose legislation applied, either solely under the legislation of that Member State or under the coordinating provisions of European social law, and entitlement to the orphan's pension *vis-à-vis* the State of non-residence subsists in respect of periods or arises only as from a period in respect of which there is no (or no longer any) entitlement to family benefits provided for under the legislation of the state of residence owing either to the fact that an age-limit or an income limit was exceeded or to the fact that they were not applied for?'

18 The referring court points out that the feature common to the four cases pending before it is that entitlement to invalidity or old-age pensions and entitlement to orphans' pensions for which the German institution is responsible are not required solely under German legislation.

The questions submitted for a preliminary ruling

19 In its two questions, which it is appropriate to examine together, the referring court is essentially asking whether Articles 77(2)(b) and 78(2)(b) of the Regulation, read in conjunction with Article 79(1) thereof, must be interpreted as meaning that the competent institution of a Member State other than that of the residence of the person in receipt of an old-age or invalidity pension, or of the residence of orphans of a deceased worker is required to grant to the persons concerned benefits for dependent children or orphans where the conditions laid down by the legislation of the Member State of residence for the award of such benefits are not or are no longer satisfied and where the entitlement of the pensioner or of the orphans claiming under the deceased worker is not acquired in the other Member State solely under the legislation of that State. It also asks

whether, none the less, in such circumstances, the competent institution of the Member State other than that of residence may be required to grant the benefits at issue under a social-security convention entered into by the two Member States concerned and incorporated in their national law prior to entry into force of the Regulation.

20 At the outset it should be pointed out that in its judgment in Case C-59/95 *Bastos Moriana and Others* [1997] ECR I-1071 the Court ruled that Articles 77(2)(b)(i) and 78(2)(b)(i) of the Regulation must be interpreted as meaning that the competent institution of a Member State is not bound to grant supplementary family benefits to pensioners or orphans residing in another Member State where the amount of the family benefits paid by the Member State of residence is lower than that of the benefits provided for by the laws of the first Member State if entitlement to the pension, or to the orphan's pension, has not been acquired solely by virtue of insurance periods completed in that State.

21 At paragraph 32 of the judgment in *Gómez Rodríguez*, cited above, the Court stated, in regard to Article 78(2)(b) of the Regulation, that, where entitlement to benefits which arose in the State of residence is lost because an age-limit has been reached, the competent institution of another Member State is not required to grant benefits to the persons concerned, unless they have acquired their entitlement there solely on the basis of the periods of insurance completed in that State.

22 As regards both Article 77(2)(b) and Article 78(2)(b) of the Regulation, that interpretation followed from the judgment in *Bastos Moriana and Others*, cited above, given in cases concerning not only benefits of an amount greater than those granted in the State of residence but also a dependent child allowance granted for a longer period by the legislation of the Member State in which the application was made, that is to say on account of a higher age-limit than that

laid down by the legislation of the Member State of residence (see *Bastos Moriana and Others*, cited above, paragraph 5, and Opinion of Advocate General Fennelly in that case, paragraphs 23 and 24). Thus, the expression 'benefit supplement' used in that judgment covered both the question of payment of the difference in amount between the benefits paid in the Member State of residence and those awarded in another Member State and the question of payment in full of a benefit by the competent institution of the Member State in which the application was made, beyond the age-limit laid down by the legislation of the Member State of residence.

23 It should be recalled in that regard that the rules laid down in Articles 77 and 78 are designed to determine the Member State whose legislation governs the grant of benefits for dependent children of pensioners and for orphans, which are then granted, in principle, in accordance with the legislation of that Member State alone (*Bastos Moriana and Others*, cited above, paragraph 15), in conformity with the principle, laid down in Article 13(1) of the Regulation, that the legislation of a single Member State is applicable.

24 As the Court has pointed out on a number of occasions, the Member States retain sole competence to determine the level and the duration of the benefits granted by them (judgment in *Gómez Rodríguez*, cited above, paragraph 28).

25 Accordingly, when, in the circumstances envisaged in Articles 77(2)(b)(i) and 78(2)(b)(i) of the Regulation one of the conditions laid down by the legislation of the Member State of residence for the grant of a benefit is not or is no longer satisfied, for example, as in the case in the main proceedings, a condition as to income ceiling or requiring the person concerned to opt for the benefit in question or as to an age-limit for the children concerned, the claimant of the benefit cannot rely on the connecting factor provided for in Articles 77(2)(b)(ii) and 78(2)(b)(ii) of the Regulation as against the competent institution of another Member State unless, in accordance with the judgments cited above in *Bastos Moriana and Others* and *Gómez Rodríguez*, his entitlement to a pension or an orphan's

entitlement through a deceased worker is acquired under the legislation of that State alone. In that connection, it should be made clear that assessment of the question whether the latter condition is satisfied, which is a question of national law, is a matter for the national court.

26 In the fourth case before the referring court it should be observed that the entitlements to an orphan's pension through a deceased worker were acquired in Germany prior to 1 January 1986 not under German legislation alone, like the entitlements acquired before his death by the worker himself, under the bilateral convention. According to the information provided by the German Government in reply to a written question put to it by the Court, the orphans' pensions at issue continued to be paid after the accession of the Kingdom of Spain to the European Communities and entry into force of the Regulation on the ground that the benefits awarded under the bilateral convention were more favourable than those provided for in the Regulation.

27 It should be pointed out in that connection that, under Article 6 of the Regulation, the latter replaces within its scope *ratione personae et materiae,* and subject to certain reservations, any social-security convention between two or more Member States.

28 In the fourth case before the referring court the entitlement to an orphan's pension was therefore maintained in Germany under the principle laid down in paragraph 29 of the judgment in Case C-227/89 *Rönfeldt* [1991] ECR I-323 and paragraphs 38 to 45 of the judgment in *Gómez Rodríguez*, cited above, according to which entitlement to a more favourable benefit under a social-security convention cannot be lost owing to the entry into force of the Regulation.

29 In those circumstances the national concerned has an established right to continued application of that convention after entry into force of the Regulation (see judgment of 5 February 2002 in Case C-277/99 *Kaske* [2002] ECR I-1261, paragraph 26).

30 In other words, if, as regards a social security advantage, a national of a Member State can benefit from a right under a convention entered into between two Member States, and if that convention is more favourable to him than a Community regulation which became applicable to him subsequently, the right derived by him under the convention is acquired by him once and for all. Accordingly, with regard to a specific benefit, where periods of insurance or employment which form the basis of the worker's rights were completed, at least partially, during a period when only the bilateral convention was applicable, the worker's overall situation must be assessed by reference to the provisions of that convention if it is favourable to him (judgment in *Kaske*, cited above, paragraphs 31 and 32).

31 It is for the national court to assess whether a claimant has an established right under a social-security convention to a more favourable benefit. If so, that right must be assimilated to a benefit entitlement acquired solely under the national legislation of the Member State in which the application was made, as may be inferred from paragraph 27 of the judgment in *Rönfeldt*, cited above.

32 The reply to the questions submitted must therefore be that Articles 77(2)(b) and 78(2)(b) of the Regulation, read in conjunction with Article 79(1) thereof, must be interpreted as meaning that the competent institution of a Member State other than that of the residence of a person in receipt of an old-age or invalidity pension, or of the residence of orphans of a deceased worker, is not required to grant the persons concerned benefits for dependent children or for orphans where the conditions laid down by the legislation of the Member State of residence for the award of such benefits are not or are no longer satisfied and where the entitlement of the pensioner or of the orphans claiming under the deceased worker is not acquired, in the other Member State, solely under the legislation of that State. None the less, in such a situation, the competent institution of the Member State other than that of residence may be required to award the benefit at issue under a social-security convention entered into by the two Member States concerned and incorporated in their national law prior to the entry into force of the Regulation, where the persons concerned have an established right to continued application of that convention after the entry into force of the Regulation.

Costs

33 The costs incurred by the German and Spanish Governments, and by the Commission, which 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 (Sixth Chamber),

in answer to the questions submitted to it by the Sozialgericht Nürnberg by order of 22 November 1999, hereby rules:

Articles 77(2)(b) and 78(2)(b) 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, and read in conjunction with Article 79(1) thereof, must be interpreted as meaning that the competent institution of a Member State other than that of the residence of a person in receipt of an old-age or invalidity pension, or of the residence of orphans of a deceased worker, is not required to

grant the persons concerned benefits for dependent children or for orphans where the conditions laid down by the legislation of the Member State of residence for the award of such benefits are not or are no longer satisfied and where the entitlement of the pensioner or of the orphans claiming under the deceased worker is not acquired, in the other Member State, solely under the legislation of that State. None the less, in such a situation, the competent institution of the Member State other than that of residence may be required to award the benefit at issue under a social-security convention entered into by the two Member States concerned and incorporated in their national law prior to the entry into force of the Regulation, where the persons concerned have an established right to continued application of that convention after the entry into force of the Regulation.

Macken Gulmann Schintgen

Skouris Cunha Rodrigues

Delivered in open court in Luxembourg on 24 September 2002.

R. Grass

Registrar

F. Macken

President of the Sixth Chamber