JUDGMENT OF THE COURT (Fourth Chamber)

4 December 2008 *

In Case C-221/07,

REFERENCE for a preliminary ruling under Article 234 EC from the Sozialgericht Stuttgart (Germany), made by decision of 26 April 2007, received at the Court on 2 May 2007, in the proceedings

Krystyna Zablocka-Weyhermüller

v

***Land* Baden-Württemberg,**

Joined party:

Bundesrepublik Deutschland,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Chamber, T. von Danwitz, R. Silva de Lapuerta (Rapporteur), E. Juhász and J. Malenovský, Judges,

Advocate General: M. Poiares Maduro,
Registrar: R. Grass,

* Language of the case: German.

having regard to the written procedure,

after considering the observations submitted on behalf of:

— *Land* Baden-Württemberg, by H. Sprau, acting as Agent,

— the German Government, by J. Möller and M. Lumma, acting as Agents,

— the Polish Government, by T. Nowakowski, acting as Agent,

— the Commission of the European Communities, by V. Kreuschitz, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Article 18(1) EC.

2 The reference was made in the course of proceedings brought by Mrs Zablocka-Weyhermüller against *Land* Baden-Württemberg concerning the refusal by the latter to pay her certain benefits which she considers are due to her in her capacity as the widow of a victim of war.

National legislation

3 The relevant national legislation consists of the Federal War Victims Relief Law (Bundesversorgungsgesetz) of 20 December 1950, in the version of 22 January 1982 (BGBl. 1982 I, p. 21), as last amended by the Law of 19 June 2006 (BGBl. 2006 I, p. 1305; 'the BVG'), and the Regulation on Foreign War Victims Relief (Auslandsversorgungsverordnung) of 30 June 1990 (BGBI. 1990 I, 1321) ('the AuslVerV') implementing that law.

4 Under Paragraph 9(5) of the BVG, the surviving dependants of victims of war essentially have the surviving dependants' pension entitlements provided for in Paragraphs 38 to 52 of that law. Over and above the basic pension — which, moreover, is not index-linked — there is, subject to compliance with certain additional conditions, entitlement to compensation for the loss in earnings of the victim of war as a result of injuries suffered, calculated by reference to the notional earnings which would have been received in the absence of such injury (Paragraph 40a of the BVG), and, if necessary, entitlement to a care allowance (Paragraph 40b of the BVG), and/or the right to a compensatory pension (Paragraph 41 of the BVG). In addition, if surviving spouses have reached the age of 45, they may also be entitled to a full compensatory pension on the basis of Paragraph 41(1)(b) and (2) of the BVG, subject to the deduction of any personal income.

5 In addition to those benefits there is, in principle, in accordance with Paragraph 9(1) and the first sentence of Paragraph 10(4)(c) of the BVG, a right to medical care and the

entitlements laid down in Paragraph 9(2) and Paragraphs 25 to 27j of the BVG in the context of care for war victims. However, those benefits are structured more on the basis of need.

6 Benefit claimants who have their domicile or habitual residence outside Germany are subject to the different arrangements set out in Paragraphs 64a to 64j of the BVG.

7 Paragraph 64e of the BVG states that:

'1. Victims of war whose domicile or habitual residence is in one of the States determined by regulation under subparagraph 5 shall receive a partial pension in accordance with subparagraphs 2 to 4. The remainder of the claim shall be suspended.

2. The partial pension shall include the basic pension, together with the compensation provided for in Paragraph 44(1), additional allowance for very severe disability, attendance supplement, parents' pension and funeral expenses allowance of one-third of the amounts resulting from Paragraphs 31, 35, 36, 40, 46, 51 and 53, with the death grant provided for in Paragraph 37. The basic pension shall be increased for disabled persons by one-third of the amount laid down in the first sentence of Paragraph 31(1) as the basic pension of a disabled person for whom the degree of incapacity to work has been set at 40%. With regard to pension payments, foreign income shall be taken into account only in those cases listed in Paragraph 48. Widows' and orphans' allowances are to be based in every case, on the total amount of the corresponding widow's or orphan's pension and one-third of the reference amount referred to in Paragraph 33(1)(a). Calculation of the funeral expenses allowance shall be based in every case on the higher amount referred to in the second sentence of Paragraph 36(1), and the second sentence of Paragraph 53.

3. The partial pension shall also include medical treatment for the purposes of Paragraph 64a(1). Allowances under Paragraph 11(3) shall not be paid; the Federal Ministry of Work and Social Affairs may authorise exceptions. The medical treatment provided for in Paragraph 64a(2) may be granted during a temporary stay outside one of the States determined by regulation pursuant to subparagraph 5, provided immediate treatment is prescribed by a doctor. Claims under sentences 1 to 3 are precluded where entitlement to the equivalent can be claimed from statutory or private insurance or a similar body.

4. The benefits in respect of war victims relief, referred to in Paragraph 64b(1), may be paid with the agreement of the Federal Ministry for Work and Social Affairs. The first sentence of Paragraph 27b(3) is not applicable.

5. The Federal Government is empowered to determine by regulation, with the agreement of the Bundesrat (Federal Council), those States in which, for specific reasons, in particular, on account of a lower average level of equivalent social benefits as compared with that in the Federal Republic of Germany, and on account of the situation and development since the Second World War, a partial pension shall be paid under subparagraph 1. Under that regulation, the Government may

(a) set at a different level the reduced rate of one-third, referred to in the first sentence of subparagraph 2, for individual benefits and establish more detailed rules for calculating the benefits;

(b) correspondingly where there is a substantial change in the relevant circumstances for the grant of a partial pension (first sentence), alter the reduced rates level laid down in the first two sentences of subparagraph 2.

6. In particular cases, the partial pension referred to in the first two sentences of subparagraph 2 and subparagraph 5 may, with the agreement of the Federal Ministry for Work and Social Affairs, be increased.

7. During a stay of at least one week outside the States determined by regulation pursuant to subparagraph 5, the pension benefits listed in the first sentence of subparagraph 2 may, with the consent of the Federal Ministry for Work and Social Affairs, be paid to the extent that they exceed the amounts under the first and second sentences of subparagraph 2, together with one-third of the compensatory pension; the third sentence of subparagraph 2 shall apply. Periods of hospitalisation, under this Law, or convalescence under Paragraph 27b, shall be taken into account only as to one-third.'

8 Paragraph 1 of the AuslVerV, implementing Article 64e of the BVG, provides, under the heading 'Scope', that:

'The partial pension under Paragraph 64e of the [BVG] shall be granted to German citizens and persons of German origin who have their domicile, or are habitually resident, in Albania, Bulgaria, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Russia, Slovakia, Slovenia, and the other States comprising the territories of the former Yugoslavia and the former Soviet Union.'

9 Paragraph 2 of the AuslVerV, entitled 'Different reduced rates' states:

'1. The reduced rate under the first sentence of Paragraph 64e(2) of the [BGV] shall be 60%. The reduced rate for the funeral expenses allowance shall be 45%.

2. The reduced rate for the additional allowance provided for in the second sentence of Paragraph 64e(2) of the [BGV] shall be 40% of the amount of the relevant basic pension under the first sentence of Paragraph 31(1) of the [BVG].

3. As an exception to the rule in the first sentence of Paragraph 64e(2) of the [BVG], orphans shall receive three-quarters of the basic pension.

4. Disabled persons shall receive a basic pension equal to the amount paid hitherto, provided that it is more favourable to them.'

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

10 Mrs Zablocka-Weyhermüller, a Polish national who was born in 1952, married Mr Weyhermüller on 7 September 2002. Mr Weyhermüller, who for several years had been recognised as severely war-disabled with a right to a pension as a victim of war, died on 12 January 2004. Until that time, he had lived in the area covered by the Versorgungsamt Münster (Münster War Pensions Office) in Germany, and had received his pension, together with several supplements and various allowances. The last payments in relation to his pension were EUR 1 419 per month.

11 On 20 April 2004, Mrs Zablocka-Weyhermüller applied to the Versorgungsamt Münster for the full surviving dependant's pension as a war widow, in accordance with the provisions of the BVG. In that application, she described herself as a Polish citizen and indicated that she wished to relocate to Poland in the near future.

12 By decision of 27 May 2004, the competent authority for paying benefits abroad accepted Mrs Zablocka-Weyhermüller's claim and held that the death of her husband was the result of war injury. The widow's pension was set at EUR 224 per month on the basis of the partial pension under Paragraphs 40 and 64e of the BVG, as from 1 February 2004.

13 Mrs Zablocka-Weyhermüller requested an increase in the benefit granted to her on the ground that the amounts previously received by her husband were significantly higher. Her request was rejected by decision of the competent authority on 19 January 2005, and that decision is the subject-matter of the dispute before the referring court. The

administrative appeal by the claimant in the main proceedings, based, inter alia, on the fact that the former common family domicile was in Germany, and that Poland was now a member of the European Union, was also rejected.

14 In the course of the main proceedings, the *Land* Baden-Württemberg agreed on 20 March 2007 to grant Mrs Zablocka-Weyhermüller a partial pension increased by the amount of the basic pension in question with retroactive effect from the date on which the she acquired her right to the pension, in accordance with Paragraph 64e(6) of the BVG. The monthly pension which resulted from that decision was EUR 372.

15 It was in those circumstances that the Sozialgericht Stuttgart (Stuttgart Social Court) decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'… [are] the benefit restrictions laid down in German social security law, under Paragraph 64e of the [BVG], for those entitled to pensions having their domicile or habitual residence in Poland as a new Member State of the [European Union], consistent with Community law, in particular from the point of view of freedom of movement[?]'

The question referred for a preliminary ruling

16 By its question, the referring court asks, in essence, whether Article 18(1) EC precludes legislation of a Member State under which the latter refuses to pay certain benefits

granted to surviving spouses of victims of war solely because they are domiciled in the territory of certain specific Member States.

Admissibility

17 Both the *Land* Baden-Württemberg and the German Government take the view that the order for reference is inadmissible.

18 As regards the widow's basic pension, which is partially reduced under the first sentence of Paragraph 64e(1) of the BVG, they point out that, in the case in the main proceedings, since that pension has been increased, with retroactive effect, to 100% of the benefit, the question referred is now completely irrelevant to the outcome of the dispute which is before the referring court. In addition, according to the German Government, a legislative amendment has been tabled to increase the current rate of the partial pension from 60% to 100% from 1 January 2008.

19 In relation to the other benefits, which are granted on the basis of income, payment of which is suspended pursuant to the second sentence of Paragraph 64e(1) of the BVG, the German Government also contends that the relevance of the question referred to the Court for the outcome of the dispute in the main proceedings has not been established. The claimant in this dispute lodged, in the course of the hearing before the referring court, an additional amending claim concerning those benefits without, however, advancing any argument in support of her claim.

20 In that regard, it should be borne in mind that, in proceedings under Article 234 EC, it is solely for the national court before which the dispute has been brought, and which must

assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted concern the interpretation of Community law, the Court is in principle bound to give a ruling (see, inter alia, Case C-119/05 *Lucchini* [2007] ECR I-6199, paragraph 43, and Case C-162/06 *International Mail Spain* [2007] ECR I-9911, paragraph 23). The Court may refuse to rule on a question referred by a national court only where it is quite obvious that the interpretation of Community law that is sought bears no relation to the actual facts of the main action or its purpose, where the problem is hypothetical, or where the Court does not have before it the factual or legal material necessary to give a useful answer to the questions submitted to it (see, inter alia, Case C-379/98 *PreussenElektra* [2001] ECR I-2099, paragraph 39; Joined Cases C-94/04 and C-202/04 *Cipolla and Others* [2006] ECR I-11421, paragraph 25; Joined Cases C-222/05 to C-225/05 *van der Weerd and Others* [2007] ECR I-4233, paragraph 22; and Case C-379/05 *Amurta* [2007] ECR I-9569, paragraph 64).

21 In the case in the main proceedings, as is apparent from the order for reference, the national court has provided to the Court a detailed account of the factual and legal background to the dispute in the main proceedings and given its reasons for taking the view that a reply to the question referred is necessary to enable it to give judgment.

22 Moreover, the referring court stated, in its reply to the request for clarification made by the Court, that, apart from the increased partial pension, referred to in paragraph 14 above, concerning the basic widow's pension, possible entitlement to the benefits provided for in Paragraphs 40a, 40b and 41 of the BVG is still a matter of dispute between the parties to the main proceedings.

23 Consequently, the reference for a preliminary ruling must be held admissible.

The applicability of Article 18(1)EC

24 At the outset, it must be ascertained whether a situation such as that in the case in the main proceedings falls within the scope of Community law and, in particular, of Article 18(1) EC.

25 As regards the scope *ratione personae* of that provision, it need merely be pointed out that, under Article 17(1) EC, every person holding the nationality of a Member State is a citizen of the Union. In addition, Article 17(2) EC attributes to citizens of the Union the rights conferred and duties imposed by the EC Treaty, including those mentioned in Article 18(1) EC (Case C-192/05 *Tas-Hagen and Tas* [2006] ECR I-10451, paragraph 18, and Case C-499/06 *Nerkowska* [2008] ECR I-3993, paragraph 21).

26 As a Polish national, Mrs Zablocka-Weyhermüller enjoys the status of a citizen of the Union established by Article 17(1) EC and may therefore rely if necessary on the rights conferred on those having that status, such as the rights to move freely and to reside freely laid down in Article 18(1) EC (*Nerkowska*, paragraph 22).

27 Secondly, as to the scope *ratione materiae* of Article 18(1) EC, it is to be noted that, as Community law now stands, a benefit such as that in issue in the main proceedings,

which is intended to compensate surviving spouses of victims of war, falls within the competence of the Member States (see, to that effect, *Tas-Hagen and Tas*, paragraph 21, and *Nerkowska*, paragraph 23).

28 However, Member States must exercise that competence in accordance with Community law, in particular with the Treaty provisions concerning the freedom accorded to every citizen of the Union to move and reside freely within the territory of the Member States (*Tas-Hagen and Tas*, paragraph 22, and *Nerkowska*, point 24).

29 In that regard, the Court has already held that situations which fall within the scope *ratione materiae* of Community law include those involving the exercise of the fundamental freedoms guaranteed by the Treaty and those involving the exercise of the freedom, as conferred by Article 18 EC, to move and reside within the territory of the Member States (Case C-209/03 *Bidar* [2005] ECR I-2119, paragraph 33; Case C-403/03 *Schempp* [2005] ECR I-6421, paragraphs 17 and 18; and *Nerkowska*, paragraph 26).

30 In the present circumstances, it should be noted that a situation such as that of Mrs Zablocka-Weyhermüller is covered by the right of citizens of the Union to move and reside freely in the Member States. By taking up residence in Poland, the claimant in the main proceedings, exercised the right conferred by Article 18(1) EC on every citizen of the Union to move and reside freely in the territory of the Member States.

31 Furthermore, it is apparent from the case-file submitted to the Court by the referring court that the suspension, under the second sentence of Paragraph 64e(1) and Paragraph 64e(5) of the BVG, and Paragraph 1 of the AuslVerV, of the benefits paid to Mrs Zablocka-Weyhermüller was attributable solely to the fact that she had taken up residence in Poland.

32 It follows from the foregoing that a situation in which the exercise by Mrs Zablocka-Weyhermüller of a freedom recognised by the Community legal order affects her right to benefits provided for by the national legislation of a Member State falls within the scope of Community law and, in particular, of Article 18(1) EC.

33 It is therefore necessary to examine whether Article 18(1) EC must be interpreted as precluding national legislation which requires, for the payment of certain benefits granted to surviving spouses of victims of war, that the beneficiary should be resident either on the territory of the Member State which grants such benefits, or on the territory of another Member State which is not on a list drawn up in a regulation by the Government of the first Member State.

The residence requirement

34 With regard to the scope of Article 18(1) EC, the Court has already held that the opportunities offered by the Treaty in relation to freedom of movement could not be fully effective if nationals of a Member State could be deterred from availing themselves of them by obstacles raised to their residence in the host Member State by the

legislation of another State penalising the fact that they have used them (see, to that effect, Case C-224/02 *Pusa* [2004] ECR I-5763, paragraph 19; *Tas-Hagen and Tas*, paragraph 30; and *Nerkowska*, paragraph 31).

35 National legislation which places certain Community nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State is a restriction on the freedoms conferred by Article 18(1) EC on every citizen of the Union (see, to that effect, Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 39; *Tas-Hagen and Tas*, paragraph 31; and *Nerkowska*, paragraph 32).

36 The BVG and the AuslVerV constitute such a restriction. By making the payment of certain benefits introduced for the benefit of surviving spouses of victims of war subject to the condition that those spouses reside in the national territory, or in the territory of another Member State not appearing on a list of Member States drawn up in a regulation by the Government of the Member State which grants those benefits, that legislation is likely to deter Community nationals who are in a situation like that of the claimant in the main proceedings from exercising their freedom to move and reside in a Member State appearing on that list.

37 National legislation which imposes such a restriction on the exercise of freedoms by Community nationals can be justified, under Community law, only if it is based on objective considerations of public interest independent of the nationality of the persons concerned and is proportionate to the legitimate objective of the national provisions (see, to that effect, *De Cuyper*, paragraph 40; *Tas-Hagen and Tas*, paragraph 33; and *Nerkowska*, paragraph 34).

38 It is clear from the observations submitted to the Court both by the *Land* Baden-Württemberg and by the German Government that the purpose of the restriction laid down in the BVG is to provide a suitable benefit to beneficiaries resident outside Germany, taking into account the current differences between the cost of living, income and the average level of social benefits paid in Germany and in the Member State in which the person entitled resides. In addition, according to those observations, the restriction is also justified by the need to ensure effective monitoring of the employment and social situation of those entitled, in particular their incomes.

39 It is true that both the desire to provide a benefit that takes into account those differences between the two Member States concerned and the need to ensure effective monitoring of the employment and social situation of beneficiaries constitute objective considerations of public interest of a kind that might justify the fact that the conditions or detailed rules for payment of the benefits, such as those at issue in the main proceedings, may affect freedom of movement.

40 Although the restriction found in paragraph 36 of this judgment is capable of being justified by objective considerations of public interest such as those referred to in paragraph 39 above, it must also not be disproportionate in relation the objective pursued. It follows from the case-law that a measure is proportionate if, while appropriate for securing the attainment of the objective pursued, it does not go beyond what is necessary in order to attain that objective (*De Cuyper*, paragraph 42, and *Tas-Hagen and Tas*, paragraph 35).

41 However, a residence condition such as that at issue in the main proceedings cannot be regarded as proportionate to the objectives pursued.

42 It must be pointed out that Paragraph 1 of the AuslVerV expressly limits the application of Paragraph 64e of the BVG to beneficiaries who are domiciled or resident on the territory of one of the 10 Member States referred to in that Paragraph, Albania, the former Yugoslavia or the former Soviet Union.

43 There are, however, States not referred to in Paragraph 1 of the AuslVerV in which the cost of living is lower than that in some of the Member States referred to in that paragraph. Moreover, the differences existing between the Member States referred to in that paragraph are considerable.

44 Likewise, the need to ensure effective monitoring of the employment and social situation of those entitled should be carried out in exactly the same way in all Member States, whether they are referred to in Paragraph 1 of the AuslVerV or not.

45 Consequently, rules such as those at issue in the main proceedings do not meet the objectives cited by the *Land* Baden-Württemberg and the German Government and set out in paragraph 38 of this judgment.

46 Moreover, in so far as such rules merely suspend payment of the benefits provided for by that regulation, it cannot validly be submitted that they are suitable for the purpose of adapting such benefits to take account of the current differences between the Federal

Republic of Germany and the beneficiary's State of residence with regard to cost of living, income and the average level of social benefits.

47 Lastly, while it is true that, as regards benefits granted on the basis of income, monitoring of the employment and social situation of the beneficiaries may prove necessary, it is nevertheless the case that the suspension of such benefits constitutes a measure which goes beyond what is necessary to carry out such monitoring.

48 In view of the foregoing considerations, the reply to the question referred must be that Article 18(1) EC is to be interpreted as precluding legislation of a Member State under which the latter refuses to pay certain benefits granted to surviving spouses of victims of war solely because they are domiciled in the territory of certain specific Member States.

Costs

49 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 (Fourth Chamber) hereby rules:

Article 18(1) EC is to be interpreted as precluding legislation of a Member State under which the latter refuses to pay certain benefits granted to surviving spouses of victims of war solely because they are domiciled in the territory of certain specific Member States.

[Signatures]