JUDGMENT OF THE COURT (Sixth Chamber)
7 November 2002 *

In Case C-333/00,

REFERENCE to the Court under Article 234 EC by the Tarkastuslautakunta (Finland) for a preliminary ruling in the proceedings pending before that court by

Eila Päivikki Maaheimo,

on the interpretation of Articles 4(1)(h), 10(a), 73 and 75 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1),

* Language of the case: Finnish

THE COURT (Sixth Chamber),

composed of: R. Schintgen, President of the Second Chamber, acting for the President of the Sixth Chamber, V. Skouris, F. Macken, N. Colneric (Rapporteur) and J.N. Cunha Rodrigues, Judges,

Advocate General: F.G. Jacobs,

Registrar: L. Hewlett, Administrator,

after considering the written observations submitted on behalf of:

— the Finnish Government, by E. Bygglin, acting as Agent,

— the Commission of the European Communities, by H. Michard and M. Huttunen, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Finnish Government and the Commission at the hearing on 10 January 2002,

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

gives the following

Judgment

1 By order of 31 May 2000, received at the Court on 11 September 2000, the Tarkastuslautakunta (Social Security Review Tribunal) referred to the Court for a preliminary ruling under Article 234 EC three questions on the interpretation of Articles 4(1)(h), 10(a), 73 and 75 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71').

2 Those questions arose in the course of proceedings between Ms Maaheimo and the Kansaneläkelaitos (Social Insurance Institution) concerning its refusal to pay the home child-care allowance to Ms Maaheimo provided for by Laki lasten kotihoiden ja yksityisen hoiden tuesta (Law No 1128/1996 on home child-care allowance and private child-care allowance, hereinafter, 'Law on home child-care allowance').

Community law

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

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

...

(h) family benefits.'

4 Article 1(u)(i) of the Regulation defines 'family benefits' as covering 'all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h), excluding the special childbirth or adoption allowances referred to in Annex II'.

5 Under Article 4(4) of Regulation No 1408/71, 'social and medical assistance' *inter alia* is excluded from the material scope of the Regulation.

6 Article 14(1)(a) of Regulation No 1408/71 provides that 'a person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member

State to perform work there for that undertaking shall continue to be subject to the legislation of the first Member State, provided that the anticipated duration of that work does not exceed 12 months ...'.

7 Article 73 of Regulation No 1408/71 provides:

'An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State ...'.

8 According to the first sentence of Article 75(1) of Regulation No 1408/71, family benefits are to be provided, in the cases referred to in Article 73, by the competent institution of the State to the legislation of which the employed or self-employed person is subject. According to the second sentence of that paragraph, those benefits are to be provided in accordance with the provisions administered by such institutions, whether or not the natural or legal person to whom such benefits are payable is residing or staying in the territory of the competent State or in that of another Member State.

9 According to Article 4(2a)(a), Regulation No 1408/71 applies to special non-contributory benefits which are provided under legislation or schemes other than those referred to in paragraph 1, where such benefits are intended to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1. Article 10a(1) provides that the persons to whom the Regulation applies are to be granted the special

non-contributory cash benefits referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa to the Regulation. The Republic of Finland has not listed the home child-care allowance in the Annex.

National law

10 Under Laki lasten päivähoidosta (Law No 36/1973 on day care of children), in Finland all parents or other persons having custody of a child have the right to a place in a day-care institution from the time entitlement to parental benefit expires until the child attains the age of compulsory schooling. Under Article 11a(1) of that law, the local authorities are to ensure that such child-care is available to those entitled. Under Article 11(2), the parents who choose not to claim a day-care place are entitled to a home child-care allowance.

11 According to Article 1 of the Law on home child-care allowance, its aim is to regulate the entitlement to financial support granted for the organisation of child-care as an alternative to a day-care place provided for by the Law on day-care of children. Under Article 3(1) of the Law on home child-care allowance: 'It is a condition of receiving the allowance referred to in this law that the child's parents or other persons having custody do not choose a day-care place in accordance with Article 11a(1) of the Law on day-care of children and that the child actually lives in Finland'.

12 Under Article 2 of the Law on home child-care allowance, 'home child-care allowance' is an allowance paid to the parents or other persons having custody for the purpose of arranging day-care which consists of care money (hoitoraha) and, where appropriate, a care supplement (hoitolisä). Care money is paid for each child in the family and varies according to the age and number of children. The care supplement, which is provided for by Article 5 of the Law on home child-care allowance, is paid in full for one child of the family if the monthly income is below the income threshold calculated according to the number of members of the family.

13 In addition, Article 20 of the Law on home child-care allowance permits an allowance in the form of a local authority supplement (kunnallinen lisä). It provides that, 'notwithstanding the provisions of the present law on care money and the care supplement, the local authority may grant a supplementary payment in addition to the basic amount and the care supplement (local authority supplementary allowance)'. However, that allowance is not referred to in the questions referred for a preliminary ruling.

14 It is incumbent on local authorities to finance the organisation of day-care. However, under Article 8 of the Law on home child-care allowance, the Kansaneläkelaitos makes the payments provided for by law. As regards the financing of the home child-care allowance, Article 9 of the Law on home child-care allowance provides that the local authority must reimburse the Kansaneläkelaitos for the costs incurred by that allowance.

The main proceedings

15 Ms Maaheimo, the applicant in the main proceedings, is a Finnish national, as are her husband and her children. Having obtained parental leave, she cared for her

children at home. From 8 January 1998 she received the home child-care allowance. During the period from 1 May 1998 to 30 April 1999, her husband worked in Germany as a posted employee. From 10 July 1998 to 31 March 1999 Ms Maaheimo and her children stayed with her husband in Germany. She claims that her permanent domicile remained in Helsinki. During that period the whole family was subject to Finnish social security legislation.

16 By decision of 27 August 1998, the Kansaneläkelaitos stopped payments to Ms Maaheimo of the home child-care allowance with effect from 10 August 1998. That decision was taken under Article 3(1) of the Law on home child-care allowance on the ground that the children were not actually resident in Finland.

17 The appeal brought by Ms Maaheimo against that decision before the Etelä-Suomeen Sosiaalivakuutuslautakunta (South-East Finland) (Social Insurance Tribunal) was dismissed by decision of 1 March 1999. On 31 March 1999, the applicant brought an appeal before the Tarkastuslautakunta for the annulment of that decision and for an order that the Kansaneläkelaitos continue to pay the allowance.

18 In those circumstances the Tarkastuslautakunta, an independent body ruling at final instance on appeals on the home child-care allowance decided to stay its proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is the home child-care allowance, provided for by the Laki lasten kotihoidon ja yksityisen hoidon tuesta (Law on home child-care allowance and private child-care allowance) to be regarded as a family benefit within the meaning of Article 4(1)(h) 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 amended by Council Regulation (EEC) No 3427/89 of 30 October 1989?

(2) If so, does Article 73 in conjunction with Article 75 of Regulation No 1408/71, having regard also to Article 10a and to the fact that the Finnish law is not mentioned in Annex IIa of the Regulation, impose an obligation to pay home child-care allowance in respect of the child of a worker posted temporarily to another Member State, where the residence requirement which applies under the national legislation is not satisfied and the choice — also, referred to in the national legislation — between a day-care place organised by the local authorities and home child-care allowance cannot therefore be made or has not in fact been made?

(3) If home child-care allowance does not fall within Community law by virtue of the provisions cited, do others provisions of that law impose an obligation to pay home child-care allowance in another Member State in the situation described in point (2)?'

The questions for preliminary ruling

19 It must be observed that, having regard to the date of the facts in the main proceedings, the applicable version of Regulation No 1408/71 appears to be that amended and updated by Regulation No 118/97, so that it is that version which must be interpreted. It must be made clear, however, that the relevant provisions of Regulation No 1408/71 have remained essentially the same.

The first question

20 By its first question, the national court asks, essentially, whether an allowance such as the home child-care allowance at issue in the main proceedings can be regarded as a family benefit for the purposes of Article 4(1)(h) of Regulation No 1408/71.

21 First, the Finnish Government argues that the home child-care allowance is unrelated to the risks listed in Article 4(1) of Regulation No 1408/71, but that it concerns social assistance within the meaning of Article 4(4). The national court refers in that regard to Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 60, in which the Court stated that a benefit must be treated as a family benefit where it is intended to enable one of the parents to devote himself or herself to the raising of a young child, and designed, more specifically, to remunerate the service of bringing up a child, to meet the other costs of caring for and raising a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from an occupational activity. In the present proceedings, the entitlement to home child-care allowance does not require that the parent himself cares for the child at home nor that he gives up employment in order to do so. The purpose of the allowance is the organisation of child-care during the day. Therefore it is not intended to cover family expenses, but is part of local authority provision of social services.

22 In that regard, it must be observed that, according to settled case-law, a benefit can be regarded as a social security benefit only if it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position (see, in this regard, Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 15, and Case C-85/99 *Offermanns* [2001] ECR I-2261).

23 A benefit such as the home child-care allowance in question in the main proceedings satisfies that condition: the provisions concerning the grant of that allowance confer on the recipients a legally defined right and care money and the care supplement are paid automatically to persons who fulfil certain objective criteria, without any individual and discretionary assessment of individual needs.

24 A benefit such as that at issue in the main proceedings also comes within the definition of family benefits and therefore relates to the risk mentioned in Article 4(1)(h) of Regulation No 1408/71. It is intended to meet family expenses within the meaning of Article 1(u)(i) of the Regulation.

25 As the Court stated in paragraph 41 of the decision in *Offermanns*, above, the expression 'to meet family expenses' in Article 1(u)(i) of Regulation No 1408/71 which defines 'family benefits' is to be interpreted as referring, in particular, to a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance of children.

26 It is true that one of the purposes of the home child-care allowance is the organisation of child-care. However, it is clear from the order for reference that the home child-care allowance is also intended to meet the expenses of the care and upbringing of children and, thus to mitigate the financial burden. Accordingly, it appears that there is a close link between family expenses and the allowance at issue in the main proceedings, so that a benefit such as the home child-care allowance must be regarded as a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71.

27 Second, the Finnish Government argues that it is the local authority in the area where the family resides which must provide day-care places and which bears the cost of the home child-care allowance paid to parents. Given that the entitlement to a day-care place is subject to a residence condition, the grant of the allowance must itself be subject to that condition.

28 In that regard, it need only be observed that the entitlement to home child-care allowance is by no means conditional on a lack of day-care places and neither is it subject to a prior application for a place. The Finnish Government itself admitted, at the hearing, that parents are free to alternate between a day-care place and the receipt of home child-care allowance.

29 Therefore the answer to the first question is that a benefit such as home child-care allowance provided for by the Law on home child-care allowance must be regarded as a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71.

The second question

30 Under Article 14(1)(a) of Regulation No 1408/71, a person employed in the territory of a Member State by an undertaking to which he is normally attached who is posted by that undertaking to the territory of another Member State to perform work there for that undertaking shall continue to be subject to the legislation — Finnish legislation in the case in the main proceedings — of the first Member State, provided that the anticipated duration of that work does not exceed 12 months.

31 According to Article 73 of Regulation No 1408/71, a worker subject to the legislation of a Member State is to be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State.

32 It must be pointed out that, according to the case-law of the Court (see Case 104/80 *Beeck* [1981] ECR 503, paragraphs 7 and 8, *Hughes*, paragraph 28, Case C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 38, and *Kuusijärvi*, paragraph 69), Article 73 of Regulation No 1408/71 is applicable to a worker who lives with his family in a Member State other than the one whose legislation is applicable to him.

33 In such a case, the spouse of the worker is also entitled to rely on that article (see *Hoever and Zachow*, paragraph 38).

34 As the Court has consistently held, Article 73 of Regulation No 1408/71 is intended to prevent Member States from making entitlement to, and the amount of, family benefits dependent on residence of the members of the worker's family in the Member State providing the benefits, so that Community workers are not deterred from exercising their right to freedom of movement (see, in particular, Case C-266/95 *Merino García* [1997] ECR I-3279, paragraph 28). Accordingly, it is all the more at odds with the purpose of Article 73 of Regulation No 1408/71 to impose a condition of actual residence.

35 The fact that a parent, like the applicant in the main proceedings, cannot choose a day-care place cannot call that conclusion into question. As stated at paragraph 28 of the present judgment, parents are free to alternate between a day-care place and the receipt of the home child-care allowance.

36 Articles 75 and 10a of Regulation No 1408/71, mentioned in that regard by the national court, do not call that conclusion into question. Article 75 does not derogate from Article 73 of the Regulation. As for Article 10a, it concerns only the special non-contributory benefits referred to in Annex IIa to the Regulation. The Finnish home child-care benefit is not mentioned in the Annex, therefore Article 10a is not applicable.

37 Therefore, a person in a position such as the applicant in the main proceedings may rely on the provisions of Article 73 of Regulation No 1408/71.

38 In the light of the above, the answer to the second question is that Article 73 of Regulation No 1408/71 must be interpreted in such a way that if the grant of a benefit such as the home child-care allowance in the main proceedings depends on the child's actual residence in the territory of the competent Member State, that condition must be considered to be satisfied where the child resides in the territory of another Member State.

The third question

39 Having regard to the answer given to the first question there is no need to answer the third question.

Costs

40 The costs incurred by the Finnish Government and by the Commission, which have submitted observations to the Court, are not recoverable. Since these proceedings are, for the parties to the main proceedings, a step in the proceedings 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 referred to it by the Tarkastuslautakunta by its decision of 31 May 2000, hereby rules:

1. **A benefit such as the home child-care allowance provided for by the Laki lasten kotihoidon ja yksityisen hoidon tuesta (Law No 1128/96 on home child-care allowance and private child-care allowance) is a family benefit within the meaning of Article 4(1)(h) of Council Regulation (EEC)**

No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996.

2. On a proper construction of Article 73 of Regulation No 1408/71, as amended and updated by Regulation No 118/97, if the grant of a benefit such as the home child-care allowance in the main proceedings depends on the child's actual residence in the territory of the competent Member State, that condition must be held to be satisfied where the child resides in the territory of another Member State.

Schintgen Skouris Macken

Colneric Cunha Rodrigues

Delivered in open court in Luxembourg on 7 November 2002.

R. Grass

Registrar

J.-P. Puissochet

President of the Sixth Chamber