JUDGMENT OF THE COURT (Fifth Chamber)
16 July 1992 *

In Case C-78/91,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Social Security Commissioner, Belfast for a preliminary ruling in the proceedings pending before that court between

Rose Hughes

and

Chief Adjudication Officer, Belfast,

on the interpretation of certain provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community, in the version codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), in particular Articles 4(1) and 73 thereof, and on the interpretation of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 45), in particular Article 7(2) thereof,

THE COURT (Fifth Chamber),

composed of: R. Joliet, President of the Chamber, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, M. Zuleeg and D. A. O. Edward, Judges,

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

* Language of the case: English.

after considering the written observations submitted on behalf of:

— Rose Hughes, by John O'Neill, Solicitor at the Belfast Law Centre,

— the United Kingdom Government, by Rosemary Caudwell, of the Treasury Solicitor's Department, acting as Agent, assisted by Brian Kerr QC, and David Pannick, Barrister,

— the German Government, by Ernst Röder and Joachim Karl, acting as Agents,

— the Commission of the European Communities, by Nicholas Khan, of its Legal Service, acting as Agent,

having regard to the Report for the Hearing,

after hearing the oral observations of Rose Hughes, represented by Nick Hanna, Solicitor, and Gerry Grainger, Barrister, the United Kingdom Government, represented by Sue Cochrane, acting as Agent, and Eleanor Sharpston, Barrister, and the Commission at the hearing on 19 March 1992,

after hearing the Opinion of the Advocate General at the sitting on 6 May 1992,

gives the following

Judgment

1 By a decision of 14 January 1991, which was received at the Court on 26 February 1991, the Social Security Commissioner, Belfast, referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a number of questions concerning the interpretation of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community, in the version codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), in particular Articles 4(1) and 73 thereof, and on

the interpretation of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 45), in particular Article 7(2) thereof.

2 Those questions were raised in the course of proceedings between Rose Hughes and the Chief Adjudication Officer, Belfast, concerning Mrs Hughes' entitlement to family credit.

3 Family credit is a weekly non-contributory cash benefit granted to families with limited means under the Social Security (Northern Ireland) Order 1986 and the Family Credit (General) Regulations (Northern Ireland) 1987.

4 Article 21 of the Social Security (Northern Ireland) Order 1986 provides:

'(1) Prescribed schemes shall provide for the following benefits (in this Order referred to as "income-related benefits") —

(a) income support;

(b) family credit; and

(c) housing benefit.

(...)

(5) Subject to regulations under Article 52(1)(a), a person in Northern Ireland is entitled to family credit if, when the claim for it is made or is treated as made —

(a) his income

(i) does not exceed the applicable amount; or

(ii) exceeds it, but only by such an amount that there is an amount remaining if the deduction for which Article 22(3) provides is made;

(b) he or, if he is a member of a married or unmarried couple, he or the other member of the couple, is engaged and normally engaged in remunerative work; and

(c) he or, if he is a member of a married or unmarried couple, he or the other member, is responsible for a member of the same household who is a child or a person of a prescribed description.'

5 Regulation 3(1) of the Family Credit (General) Regulations (Northern Ireland) 1987 defines the condition concerning residence and presence in Northern Ireland as follows:

'A person shall be treated as being in Northern Ireland if, on the date of claim —

(a) he is present and ordinarily resident in Northern Ireland;

(b) his partner, if any, is ordinarily resident in the United Kingdom;

(c) his earnings or the earnings of his partner, if any, derive at least in part from remunerative work in the United Kingdom or the Republic of Ireland; and

(d) his earnings do not wholly derive from remunerative work outside the United Kingdom or the Republic of Ireland nor do the earnings of his partner, if any.'

6 Mrs Hughes lives with her husband and three children in Ireland. She does not work. Her husband, a national of the United Kingdom, works in Northern Ireland at the Ministry of Agriculture and has never worked outside Northern Ireland.

7 On 30 March 1988 Mrs Hughes applied to the competent authority in Northern Ireland for family credit. That application was rejected first by the Adjudication Officer and then, on appeal, by the Enniskillen Social Security Appeal Tribunal, on the ground that Mrs Hughes did not satisfy the residence condition provided for by Article 21(5) of the Social Security (Northern Ireland) Order 1986, as defined in Regulation 3(1) of the Family Credit (General) Regulations (Northern Ireland) 1987.

8 Mrs Hughes considers that, even if she does not fulfil the residence condition, she is none the less entitled to family credit by virtue of Community law. She argues that family credit, as a family benefit, constitutes a social security benefit for the purposes of Article 4(1)(h) of Regulation No 1408/71 and that the regulation, and in particular Article 73 thereof, should be applied. In the alternative, Mrs Hughes claims that family credit is a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 and that the residence condition imposed by the United Kingdom legislation constitutes indirect discrimination against migrant workers prohibited by that article.

9 The Adjudication Officer contends that family credit is not a social security benefit within the meaning of Article 4(1) of Regulation No 1408/71 and hence falls

outside the scope of Regulation No 1408/71. It is, in his view, a social advantage within the meaning of Article 7(2) of Regulation No 1612/68; however, that regulation may be relied upon only by a national of a Member State other than that in which the person concerned is employed.

10 The Social Security Commissioner, before whom the matter was brought on appeal, stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'(1) Is family credit a social security benefit within the meaning of Article 4(1) of Regulation No 1408/71?

(2) If so, where an employed person is subject to the legislation of one Member State (Member State A), is such person's spouse entitled under Article 73 of Regulation (EEC) No 1408/71 to receive in respect of members of that employed person's family residing in another Member State (Member State B) family benefits provided by the legislation of Member State A where such a spouse is and has been neither resident nor employed in Member State A?

(3) If family credit is not a social security benefit, is it a social advantage within the meaning of Article 7(2) of Regulation No 1612/68?

(4) If so, can that regulation apply where the worker is a national of the Member State in which he is and always has been employed?

(5) If so, does that regulation confer rights upon the spouse of such a worker in her own right when such spouse does not reside in the Member State in which the worker is employed?'

11 Reference is made to the Report for the Hearing for a more detailed account of the facts and the legal background to the case, the course of the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

12 By its first question, which concerns the scope *ratione materiae* of Regulation No 1408/71, the national court seeks to ascertain whether a benefit such as family credit should be considered a social security benefit for the purposes of Article 4(1) of Regulation No 1408/71.

13 By virtue of Article 4(1) of Regulation No 1408/71 the scope *ratione materiae* of the regulation extends to all legislation of the Member States concerning the branches of social security listed in indents (a) to (h) of that provision, whereas under Article 4(4) the regulation does not apply, *inter alia*, to 'social and medical assistance'.

14 The Court has repeatedly held that the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of the particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation.

15 Moreover, the Court has consistently stated that a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and provided that it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see in particular Case C-356/89 *Newton* [1991] ECR I-3017; Joined Cases 379/85 to 381/85 and 93/86 *Giletti* [1987] ECR 955, paragraph 11; and Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14).

16 If those criteria are applied to a benefit such as family credit, it is clear, as regards the first condition, that the provisions governing the grant of family credit confer upon recipients a legally defined right. The United Kingdom and German Governments consider, however, that the personal needs of the claimant constitute an essential criterion for the grant of family credit, and that the benefit must therefore be regarded as social assistance.

17 Whilst it is true that a benefit such as family credit is granted or refused solely on the basis of the claimant's assets, income, and the number and age of his dependent children, it does not follow that the grant of the benefit is dependent on an individual assessment of the claimant's personal needs, which is a characteristic feature of social assistance (see Case 187/73 *Callemeyn* [1974] ECR 553, paragraphs 7 and 8). The criteria applied are objective, legally defined criteria which, if met, confer entitlement to the benefit, the competent authority having no power to take account of other personal circumstances.

18 As regards the second condition, the United Kingdom Government argues that family credit does not fall within any of the branches of social security listed in Article 4(1) of Regulation No 1408/71, since the main purpose of the benefit is to provide supplementary income for poorly paid workers with a family who would have a higher income if they were unemployed in order to encourage them to continue working.

19 It appears from the documents before the Court that family credit in fact performs a dual function: first, as the United Kingdom Government has stated, it encourages workers who are poorly paid to continue working; and secondly, it is intended to meet family expenses, as is clear in particular from the fact that it is paid only where the claimant's family includes one or more children and from the fact that the amount of the benefit varies according to the age of the children.

20 It is by virtue of that second function that a benefit such as family credit falls within the category of family benefits defined in Article 1(u)(i) of Regulation No 1408/71 and hence relates to the risk referred to in Article 4(1)(h) of the regulation.

21 Contrary to the view expressed by the United Kingdom and German Governments, the fact that the grant of the benefit is not subject to any contribution requirement does not affect its classification as a social security benefit. The method by which a benefit is financed is immaterial for the purposes of its classification as a social security benefit, as is clear from the fact that under Article 4(2) of Regulation No 1408/71 non-contributory benefits are not excluded from the scope of the regulation.

22 Consequently, the reply to be given to the first question is that a benefit which is granted automatically to families meeting certain objective criteria, relating in particular to their size, income and capital resources, must be considered a family benefit for the purposes of Article 4(1)(h) of Regulation No 1408/71.

The second question

23 It is necessary next to consider the second question concerning the scope *ratione personae* of Regulation No 1408/71. The national court seeks to ascertain whether, where an employed person is subject to the legislation of one Member State and lives with his family in another Member State, his spouse is entitled under Article 73 of Regulation No 1408/71 to receive family benefits provided for by the legislation of the State in which the employed person works, even if his spouse has never been resident or employed in that State.

24 By virtue of Article 73 of Regulation No 1408/71 an employed or self-employed person subject to the legislation of a Member State is 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'.

25 By virtue of Article 2(1) of Regulation No 1408/71, the provisions of the regulation, including those of Article 73, apply 'to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States ... as well as to the members of their families and their survivors'. As the Court stated in Case 40/76 *Kermaschek* [1976] ECR 1669, under Regulation No 1408/71 the members of a worker's family can only claim derived rights acquired through their status as a member of the family of a worker, that is to say, of a person who can claim the rights to benefits covered by the regulation as rights of his own.

26 It follows that the spouse of an employed person can claim a derived right to family benefits under Article 73 of Regulation No 1408/71 provided that he or she is a member of the family of a worker who fulfils the conditions laid down in Article 73 and provided also that under national legislation the family benefits concerned are provided for family members.

27 Since Article 73 of Regulation No 1408/71 does not require that the worker's spouse should also work in the Member State whose legislation is applicable, but refers specifically to the case where a worker's family resides in another Member State, it is immaterial for the purposes of the grant of a derived right to family benefits that the worker's spouse has never been resident or employed in the Member State whose legislation is applicable.

28 It follows from the foregoing that the reply to be given to the second question is that, where an employed person is subject to the legislation of a Member State and lives with his family in another Member State, his spouse who has never been resident or employed in the State where the worker is employed may rely on

Article 73 of Regulation No 1408/71 in order to claim a derived right to receive family benefits for the members of the worker's family from the competent institution of that State, provided that the worker fulfils the conditions laid down in Article 73 and provided also that under national legislation the family benefits concerned are provided for family members.

The third, fourth and fifth questions

29 By its third, fourth and fifth questions the national court raises problems concerning the scope *ratione materiae* and *ratione personae* of Regulation No 1612/68. However, those questions were put only in the event that family credit cannot be considered a social security benefit and that Regulation No 1408/71 is inapplicable. In view of the reply given to the first question, it is unnecessary to reply to these questions.

Costs

30 The costs incurred by the United Kingdom and the Federal Republic of Germany Governments and the Commission of the European Communities, 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 (Fifth Chamber)

in answer to the questions referred to it by the Social Security Commissioner, Belfast, by decision of 14 January 1991, hereby rules:

1. A benefit which is granted automatically to families meeting certain objective criteria concerning in particular their size, income and capital resources

must be considered a family benefit for the purposes of Article 4(1)(h) of Regulation (EEC) No 1408/71 of the Council of 14 June 1974 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community.

2. **Where an employed person is subject to the legislation of a Member State and lives with his family in another Member State, his spouse who has never been resident or employed in the State in which the worker is employed may rely on Article 73 of Regulation No 1408/71 in order to claim a derived right to receive family benefits for the members of the worker's family from the competent institution of that State, provided that the worker fulfils the conditions laid down in Article 73 and provided also that under national legislation the family benefits concerned are provided for family members.**

Joliet Moitinho de Almeida

Rodríguez Iglesias Zuleeg Edward

Delivered in open court in Luxembourg on 16 July 1992.

J.-G. Giraud
Registrar

R. Joliet
President of the Fifth Chamber