JUDGMENT OF THE COURT (First Chamber)

7 July 2005 *

In Case C-153/03,

Reference under Article 234 EC for a preliminary ruling by the Cour de cassation (Luxembourg), by decision of 6 March 2003, received at the Court on 3 April 2003, in the proceedings

Caisse nationale des prestations familiales

v

Ursula Schwarz, née Weide,

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, N. Colneric, J.N. Cunha Rodrigues (Rapporteur), M. Ilešič and E. Levits, Judges,

* Language of the case: French.

Advocate General: J. Kokott,
Registrar: M. Múgica Arzamendi, Principal Administrator,

having regard to the written procedure and further to the hearing on 24 June 2004,

after considering the observations submitted on behalf of:

— the Caisse nationale des prestations familiales, by D. Spielmann and H. Dupong, avocats,

— the Luxembourg Government, by P. Gramegna, acting as Agent,

— the German Government, by W.-D. Plessing and A. Tiemann, acting as Agents,

— the Austrian Government, by H. Dossi, acting as Agent,

— the Commission of the European Communities, by H. Michard and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 15 July 2004,

gives the following

Judgment

1 The reference for a preliminary ruling concerns the interpretation of Article 76 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 This reference has been made in the context of proceedings between the Luxembourg Caisse nationale des prestations familiales (Luxembourg national family benefits fund, 'the CNPF') and Ms Weide, a German national, concerning the payment of the child-raising allowance provided for under Luxembourg legislation.

Legal framework

Community legislation

3 According to Article 1(u)(i) of Regulation No 1408/71:

'For the purpose of this Regulation:

...

(u) (i) the term *family benefits* means 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'.

4 According to Article 4(1)(h) of Regulation No 1408/71, that regulation is to apply to all legislation relating to those branches of social security which concern 'family benefits'.

5 Article 13 of Regulation No 1408/71 provides:

'1. Subject to Article 14c, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...'.

6 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, subject to the provisions of Annex VI.'

7 Article 76 of Regulation No 1408/71, entitled 'Rules of priority in cases of overlapping entitlement to family benefits under the legislation of the competent State and under the legislation of the Member State of residence of the members of the family', provides:

'1. Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Article 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.

2. If an application for benefits is not made in the Member State in whose territory the members of the family are residing, the competent institution of the other Member State may apply the provisions of paragraph 1 as if benefits were granted in the first Member State.'

8 Under paragraph (1) of Article 10 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by Regulation No 118/97 ('Regulation No 574/72'), entitled 'Rules applicable in the case of overlapping of rights to family benefits or family allowances for employed or self-employed persons':

'(a) Entitlement to benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment, shall be suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another Member State or in application of Articles 73, 74, 77 or 78 of the Regulation, up to the sum of those benefits.

(b) However, where a professional or trade activity is carried out in the territory of the first Member State:

(i) in the case of benefits due either only under national legislation of another Member State or under Articles 73 or 74 of the Regulation to the person entitled to family benefits or to the person to whom they are to be paid, the right to family benefits due either only under national legislation of that other Member State or under these Articles shall be suspended up to the sum of family benefits provided for by the legislation of the Member State in whose territory the member of the family is residing. The cost of the benefits paid by the Member State in whose territory the member of the family is residing shall be borne by that Member State;

...'.

9 Article 114 of Regulation No 574/72, entitled 'Provisional payments of benefits in cases of dispute over the legislation to be applied or the institution which should provide benefits', provides as follows:

'In the case of a dispute between the institutions or competent authorities of two or more Member States, either as to which legislation should apply under Title II of the Regulation, or as to which institution should provide the benefits, the person concerned who could claim benefits if there were no dispute shall provisionally receive the benefits provided for by the legislation administered by the institution of the place of residence or, if the person concerned does not reside in the territory of one of the Member States concerned, the benefits provided for by the legislation administered by the institution to which his claim was submitted in the first instance.'

National legislation

Luxembourg legislation

10 Article 2(1) of the Law of 1 August 1988 establishing a child-raising allowance, in the amended version thereof applicable to the main proceedings of this case ('the 1988 Law'), provides:

'Any person who:

(a) is domiciled in the Grand Duchy of Luxembourg and actually resides there;

(b) raises in his home a child or children in respect of whom the applicant or his spouse from whom he is not separated receives family allowances and who fulfil with respect to him the conditions laid down in Article 2 of the amended Law of 19 June 1985 on family allowances and creating the Caisse nationale des prestations familiales;

(c) whose principal activity is the raising of child(ren) in the family home and is not employed or does not have any equivalent income,

shall be entitled to a child-raising allowance ...'.

German legislation

11 According to Paragraph 1(1) of the Bundeserziehungsgeldgesetz (Law on the child-raising allowance and parental leave) of 25 July 1985, in the version in force on 25 July 1989 (BGBl. 1989 I, p. 1550), as amended by the Law of 17 December 1990 (BGBl. 1990 I, p. 2823) ('the BErzGG'), any person who is permanently or ordinarily resident in Germany, has a dependent child in his household, looks after and raises that child himself and has no, or no full-time, employment is entitled to the child-raising allowance.

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

12 Ms Weide worked in Luxembourg from October 1993 until May 1998, whilst continuing to reside in Germany with her husband and first child. Following a

period of maternity leave after the birth of her second child on 11 May 1998 and a brief period of unpaid leave, she decided to stay at home to look after her second child from 1 October 1998 until 15 May 2000. That period was recognised as a period of contribution for pension insurance purposes for Ms Weide in the Member State of employment under Article 171 of the Luxembourg Code des assurances sociales (Social Insurance Code). The case-file also shows that she again worked for her former employer in Luxembourg from 16 May to 30 September 2000.

13 Ms Weide's application in June 1998 for the child-raising allowance provided for under the BErzGG was refused by the competent German authority. That refusal was subsequently upheld at first and second instance respectively by the Sozialgericht für das Saarland (Saarland Social Court) and the Landessozialgericht für das Saarland (Saarland Higher Social Court) (Germany).

14 According to those courts, although Ms Weide did fulfil the conditions for receiving the child-raising allowance under the BErzGG, pursuant to Articles 13 and 73 of Regulation No 1408/71 it was for the Grand Duchy of Luxembourg, in its capacity as the Member State in which Ms Weide was employed, to pay the child-raising allowance provided for by its own legislation. The conditions for the application of Article 76 of Regulation No 1408/71 were not met in this case. The Sozialgericht für das Saarland stated in this respect that Ms Weide's entitlement to the German child-raising allowance derived from her residing in Germany and not from work there, contrary to the requirements of Article 76, which provides for employment-related benefits. The Landessozialgericht für das Saarland stated that Ms Weide's spouse did not satisfy the conditions for receiving the German allowance, precisely because he carried on an occupation. Accordingly, Article 76 of Regulation No 1408/71 was not applicable to the present case.

15 Ms Weide then filed a claim with the CNPF for payment of the child-raising allowance under the 1988 Law, which claim was refused by decision of 30 November 2000. The CNPF did, however, allow Ms Weide the supplement corresponding to the difference between the amount of the child-raising benefit which she should have received in Germany and the higher child-raising allowance provided for by the 1988 Law.

16 Ms Weide challenged that decision before the Conseil arbitral des assurances sociales (Social Insurance Appeals Board) (Luxembourg), which reversed the earlier decision by a ruling of 7 December 2001 and allowed the claim for the child-raising allowance provided for under the 1988 Law. That ruling was appealed by the CNPF but upheld by judgment of 27 May 2002 of the Conseil supérieur des assurances sociales (Supreme Council of Social Insurance) (Luxembourg). According to that judgment, Article 76 of Regulation No 1408/71 would apply only if Ms Weide was entitled to family benefits in Germany, which was not the case here, as she had never worked or contributed there. Accordingly, pursuant to Articles 13 and 73 of Regulation No 1408/71, the child-raising allowance should be paid by the Member State of employment.

17 The CNPF then appealed to the Cour de cassation (Court of Cassation), which decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'1. Must Article 76 of ... Regulation ... No 1408/71 ... be interpreted as applying only where a migrant worker is entitled to family benefits under the legislation of the State of employment and under the legislation of the State in which the members of his family are resident?

2. If so, may the bodies of the State of employment suspend entitlement to family benefits where they consider that a refusal to grant family benefits in the State of residence is incompatible with Community law?

3. If not, does Article 76 of Regulation No 1408/71 permit the State of employment to apply the rule against aggregation of benefits where, under the law of the State of residence of the family members, the worker's spouse receives or is entitled to similar family benefits?'

The questions referred for a preliminary ruling

18 The Court notes as a preliminary point that both the child-raising allowance provided for by the BErzGG (Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraphs 18 to 27) and the child-raising allowance under the 1988 Law, which bears similarities to the German child-raising allowance, fulfil the conditions for being considered as 'family benefits' within the meaning of Article 4(1)(h) of Regulation No 1408/71.

19 The Court has already held, however, that the rule that a person is subject only to the legislation of the Member State of employment laid down by Article 13 of Regulation No 1408/71 does not preclude certain benefits being governed by the more specific rules of that regulation (see, inter alia, Case C-119/91 *McMenamin* [1992] ECR I-6393, paragraph 14).

20 With respect to family benefits, Article 73 of Regulation No 1408/71 provides that a worker 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.

21 Article 76 of Regulation No 1408/71, to which the questions referred relate, comprises, according to the very wording of its title, '[r]ules of priority in cases of overlapping entitlement to family benefits under the legislation of the competent State and under the legislation of the Member State of residence of the members of the family'.

22 That provision covers, more specifically, situations where 'during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing'. Accordingly, in order for that provision to apply, family benefits must be owed by the Member State of residence by virtue of the person concerned carrying on an occupation.

23 It appears from both the case-file and the observations submitted to the Court that a person in Ms Weide's situation is, pursuant to Article 73 of Regulation No 1408/71, entitled to the child-raising allowance provided for by the 1988 Law because of her status as a person employed in Luxembourg, a status which remains for as long as that person is covered by a general or special social security scheme in Luxembourg (see, to that effect, Case C-543/03 *Dodl and Oberhollenzer* [2005] ECR I-5049, paragraph 30), and at the same time fulfils the conditions for receiving the child-raising allowance under the legislation of the Member State of residence, namely the

Federal Republic of Germany, which makes entitlement to such an allowance subject not to the prior carrying on of an occupation but rather to residence in Germany.

24 Moreover, the latter scenario, in which entitlement to family benefits in the Member State of residence is not subject to conditions of insurance, employment or self-employment, but rather to a condition of residence, is provided for in Article 10 of Regulation No 574/72.

25 It is settled case-law that, in order to provide a useful reply to the court which has referred to it a question for a preliminary ruling, the Court may be required to take into consideration rules of Community law to which the national court did not refer in its questions (see, inter alia, Case C-60/03 *Wolff & Muller* [2004] ECR I-9553, paragraph 24).

26 In those circumstances, it is appropriate to consider the present case taking into account the rules against overlapping of benefits laid down in Article 10 of Regulation No 574/72.

27 First of all, it is important to bear in mind that, regardless of the answers given to the questions referred, in a case such as that at issue in the main proceedings, Article 114 of Regulation No 574/72 requires that the authority in the Member State of residence must in any event pay provisionally the allowance provided for by the legislation which it applies, in this case the child-raising allowance provided for by

the BErzGG, whilst awaiting the definitive outcome of the dispute involving that authority and the Member State of employment.

28 As pointed out by the Court in paragraphs 17 and 18 of *McMenamin*, under the rule against overlapping of benefits laid down in Article 10(1)(a) of Regulation No 574/72, allowances payable by the Member State of employment take priority over allowances payable by the Member State of residence, which are consequently suspended. However, where a professional or trade activity is exercised or pursued in the Member State of residence, Article 10(1)(b)(i) of Regulation No 574/72 lays down the converse rule that the right to allowances payable by the Member State of residence prevails over the right to benefits payable by the Member State of employment, which are then suspended.

29 In paragraph 19 of the same judgment, the Court stated that, under the latter provision, the professional or trade activity, which has the effect of reversing the priorities, must be exercised or pursued in the Member State of residence 'by the person entitled to the family benefits or family allowances, or the person to whom they are paid'.

30 The Court has interpreted this passage as intended by the legislature, namely as meaning that the exercise by a person having the care of children, and, in particular, by the spouse of the person entitled in pursuance of Article 73 of Regulation No 1408/71, of a professional or trade activity in the Member State of residence of the children suspends, under Article 10 of Regulation No 574/72, the right to allowances in pursuance of Article 73 of Regulation No 1408/71 up to the amount of the allowances of the same kind actually paid by the Member State of residence, irrespective of who is designated as directly entitled to the family allowances by the legislation of the Member State of residence (*McMenamin*, paragraphs 20 to 27).

31 As stated by the Advocate General in point 39 of her Opinion and as stated inter alia in paragraph 60 of *Dodl and Oberhollenzer*, amendments to Article 10 of Regulation No 574/72 in relation to the wording of that provision as it applied at the time of the proceedings which gave rise to the judgment in *McMenamin* are not such as to affect this interpretation.

32 Thus, the Court held in paragraph 64 of *Dodl and Oberhollenzer* that where a person having the care of children, in particular the spouse or partner of the employed person, carries out a professional or trade activity in the Member State of residence, where the legislation of the Member State of employment and that of the Member State of residence each provide for an entitlement to family benefits in respect of the same member of that person's family and for the same period, the family benefits must be paid by the Member State of residence in application of Article 10(1)(b)(i) of Regulation No 574/72, irrespective of who is designated as being directly entitled to those benefits by the legislation of that State. In that situation, the payment of family benefits by the Member State of employment is to be suspended up to the sum of family benefits provided for by the legislation of the Member State of residence.

33 It follows that in a situation such as that at issue in the main proceedings, Article 10 (1)(b)(i) of Regulation No 574/72 means that the exercise by the spouse of the person entitled to the child-raising allowance provided for by the 1988 Law in pursuance of Article 73 of Regulation No 1408/71 of a professional or trade activity in the Member State of residence of the children, in this case the Federal Republic of Germany, suspends entitlement to allowances in pursuance of Article 73 of Regulation No 1408/71 up to the amount of the child-raising allowances provided for by the legislation of the Member State of residence, even if those allowances are owed to the beneficiary of the Luxembourg allowance and not to that person's spouse.

34 Accordingly, the answer to the questions referred should be that Article 10(1)(b)(i) of Regulation No 574/72 must be interpreted as meaning that the exercise by the spouse of the person entitled to a family benefit in pursuance of Article 73 of Regulation No 1408/71 of a professional or trade activity in the Member State of residence of the children suspends entitlement to allowances in pursuance of Article 73 of Regulation No 1408/71 up to the amount of the child-raising allowances provided for by the legislation of the Member State of residence, irrespective of who is designated as being directly entitled to the family allowances by the legislation of that State.

Costs

35 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 (First Chamber) hereby rules:

Article 10(1)(b)(i) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 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, must be interpreted as meaning that the exercise by the

spouse of the person entitled to a family benefit in pursuance of Article 73 of Council Regulation (EEC) No 1408/71 of 14 June 1971, as amended and updated by Regulation No 118/97, of a professional or trade activity in the Member State of residence of the children suspends entitlement to allowances in pursuance of Article 73 of Regulation No 1408/71 up to the amount of the child-raising allowances provided for by the legislation of the Member State of residence, irrespective of who is designated as being directly entitled to the family allowances by the legislation of that State.

[Signatures]