JUDGMENT OF THE COURT (Fifth Chamber)

15 March 2001 *

In Case C-85/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Oberster Gerichtshof, Austria, for a preliminary ruling in the proceedings brought before that court by

Vincent Offermanns and Esther Offermanns,

on the interpretation of Articles 3 and 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 (OJ 1997 L 28, p. 1), and of Articles 6 and 52 of the EC Treaty (now, after amendment, Articles 12 EC and 43 EC),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet, D.A.O. Edward (Rapporteur), P. Jann and L. Sevón, Judges,

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the Commission of the European Communities, by V. Kreuschitz and P. Hillenkamp, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Austrian Government, represented by G. Hesse, acting as Agent, of the Swedish Government, represented by L. Nordling, acting as Agent, and of the Commission, represented by V. Kreuschitz, at the hearing on 22 June 2000,

after hearing the Opinion of the Advocate General at the sitting on 28 September 2000,

gives the following

Judgment

1 By order of 23 February 1999, received at the Court on 10 March 1999, the Oberster Gerichtshof (Austrian Supreme Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) two questions on the interpretation of Articles 3 and 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 (OJ 1997 L 28, p. 1, hereinafter referred to as 'Regulation No 1408/71'), and of Articles 6 and 52 of the EC Treaty (now, after amendment, Articles 12 EC and 43 EC).

2 The two question have been raised in proceedings brought by Vincent and Esther Offermanns, minor children of divorced parents, seeking payment from the Familienlastenausgleichsfonds (Family Costs Contribution Fund) of advances on outstanding maintenance payments due by their father.

The Community legislation

3 The aim of Regulation No 1408/71 is to coordinate, within the framework of the free movement of persons, national social security legislation in accordance with the objectives of Article 51 of the EC Treaty (now, after amendment, Article 42 EC).

4 Article 1 of Regulation No 1408/71, entitled 'Definitions', provides:

'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 child birth or adoption allowances referred to in Annex II;

...'.

5 Article 2(1) of Regulation No 1408/71, defining the persons covered by the Regulation, provides:

'1. This Regulation shall apply to employed or self-employed persons who are or who have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.'

6 Article 3 of Regulation No 1408/71, relating to 'equality of treatment', provides:

'1. Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.

2. ...

3. Save as provided in Annex III, the provisions of social security conventions which remain in force pursuant to Article 7(2)(c) and the provisions of conventions concluded pursuant to Article 8(1), shall apply to all persons to whom this Regulation applies.'

7 Article 4 of Regulation No 1408/71, which defines the matters covered by the Regulation, provides in paragraph (1)(h):

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

...

(h) family benefits'.

8 Article 5 of Regulation No 1408/71, relating to Declarations by the Member States on the scope of the Regulation, provides:

'The Member States shall specify the legislation and schemes referred to in Article 4(1) and (2), the special non-contributory benefits referred to in Article 4(2a), the minimum benefits referred to in Article 50 and the benefits referred to in Articles 77 and 78 in declarations to be notified and published in accordance with Article 97.'

9 Article 7(1) and (2) 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. 475) provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment.

2. He shall enjoy the same social and tax advantages as national workers.'

The national legislation

10 The Austrian Bundesgesetz über die Gewährung von Vorschüssen auf den Unterhalt von Kindern (Unterhaltsvorschußgesetz) (Federal Austrian Law on the Grant of Advances for the Maintenance of Children, BGBl., 1985, No 451, hereinafter 'the UVG'), enacted in 1985, provides for the grant by the State, on the conditions it lays down, of advances on maintenance payments.

11 Article 2(1) of the UVG provides:

'Minor children who are ordinarily resident in Austria and are either Austrian nationals or are stateless shall be entitled to advances...'.

12 Article 3 of the UVG provides:

'Advances shall be granted

1. where a writ of execution enforceable in Austria exists in respect of the legal right to maintenance payments and

2. where execution in respect of current maintenance payments... or, where the person in default of payment of maintenance clearly has no income or other form of regular remuneration, execution... has not covered in full, in the last six months prior to the submission of that application for the grant of an

advance, even one of the maintenance payments due. In that respect, maintenance arrears when recovered shall be set off against the current maintenance debt.'

13 Article 4 of the UVG provides that, in certain circumstances, advances are to be granted even where execution appears to have no prospect of success or where no entitlement to maintenance has been determined.

14 Articles 30 and 31 of the UVG provide that the public authorities are to be subrogated to a child's claims for maintenance on which advances have been made. Where the person in default of payment of maintenance makes no payments, the debt may be recovered by distraint.

15 The grant of an advance on maintenance does not depend on the recipient being in a state of indigence and involves no exercise of discretion in the assessment of the particular case.

16 The UVG was adopted on the basis of Article 10(1), point 6, of the Austrian Constitution, which confers competence in 'civil' matters on the Austrian Federal State.

17 The UVG was not amended following the accession of the Austrian Republic to the European Union. Moreover, the Austrian Government did not notify any declaration, pursuant to Article 5 of Regulation No 1408/71, that the UVG was to be regarded as a scheme referred to in Article 4(1) and (2) of that Regulation.

The main proceedings and the questions referred for a preliminary ruling

18 The applicants in the main proceedings, who are minors (hereinafter 'the children'), and their parents are German nationals who have resided in Austria since 1987. Both parents carry on self-employed activities in that Member State.

19 The parents were divorced on 1 February 1995 and the mother was granted sole custody of the children. On 17 January 1996, the father agreed in a court settlement to make a monthly payment towards the maintenance of each child amounting to ATS 3 500 but made no further payments after February 1998.

20 On 1 September 1998, the children, relying on the provisions of the UVG, applied for the grant of advances on maintenance payments at the monthly rate of ATS 3 500. They claimed that they had tried to execute their enforceable claim against their father, but to no avail because their father no longer had any income.

21 It is common ground that the children do not fulfil the conditions laid down by the German social security system for the grant of advances on maintenance.

22 Relying on Article 2(1) of the UVG, the Austrian court of first instance dismissed the children's application on grounds of their German nationality. The appeal court upheld that decision, holding that advances on maintenance were neither family benefits within the meaning of Regulation No 1408/71 nor social advantages within the meaning of Article 7(2) of Regulation No 1612/68. Moreover, according to that court, the restriction of advances on maintenance to children who have their habitual residence in Austria and who are Austrian

nationals or stateless did not constitute a breach of the Community principle of non-discrimination.

23 On appeal on a point of law, the Oberster Gerichtshof decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Are advances on maintenance payments for minor children of self-employed persons, granted under the Austrian Federal Law on the Grant of Advances on Maintenance for Children (Unterhaltsvorschußgesetz 1985 — UVG — current version in BGBl. p. 451), family benefits under 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, and is Article 3 of that regulation, concerning equal treatment, therefore applicable in such a case?

(2) If Question 1 is to be answered in the negative:

Are minor children who, like their parents — who are self-employed in the Republic of Austria — are German nationals but ordinarily resident in the Republic of Austria and who are applying for the grant of advances on maintenance under the Austrian Federal Law on the Grant of Advances on Maintenance for Children (Unterhaltsvorschußsgesetz 1985) discriminated

against as family members, contrary to Article 52 of the EC Treaty or the first paragraph of Article 6 of the EC Treaty, by virtue of the fact that entitlement to such advances is withheld from them under Article 2(1) of the UVG on the ground that they are German nationals?'

The first question referred for a preliminary ruling

24 Having regard to the date of the circumstances giving rise to the main action, the applicable version of Regulation No 1408/71 appears to be that amended and updated by Regulation No 118/97, so that it is the latter regulation which falls to be interpreted. However, it must be emphasised that the relevant provisions of Regulation No 1408/71 have in substance remained the same.

25 The essence of the first question, which concerns the scope *ratione materiae* of Regulation No 1408/71, is whether a benefit such as the advance on maintenance payments provided for by the UVG constitutes a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71.

26 It should be stressed at the outset that the fact that the Austrian Government has not specified the UVG in a declaration pursuant to Article 5 of Regulation No 1408/71 as a scheme referred to in Article 4(1) and (2) of that regulation, is not of itself proof that the UVG does not fall within the scope of that regulation (see, in particular, Case 35/77 *Beerens* [1977] ECR 2249, paragraph 9).

27 Moreover, as the Austrian Government and the Commission have pointed out, the Court has repeatedly held that the distinction between benefits excluded from

the scope of Regulation No 1408/71 and those falling within its scope is based essentially on the constituent elements of each particular benefit, in particular its purposes and the conditions on which it is granted (see, in particular, Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 14, and Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 17).

28 The Court has consistently stated that a benefit can be regarded as a social security benefit only if, first, it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined position and, second, it relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, in this regard, Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14, and *Hughes*, cited above, paragraph 15).

29 It is common ground that the advance on maintenance payments provided for by the UVG satisfies the first of the two conditions mentioned in the preceding paragraph. It is therefore necessary to determine whether the advance on maintenance payments satisfies the second of those conditions, namely whether, having regard to its constituent elements, in particular its purposes and the conditions on which it is granted, it falls within the branch of social security relating to family benefits within the meaning of Article 4(1)(h) of Regulation No 1408/71.

30 The Austrian Government and the Commission consider that that question must be answered in the negative, for various reasons.

31 First of all, according to the Austrian Government, since it is the minor child — rather than the parent having custody of the child — who is the person entitled

to the maintenance payments owed by the other parent, that entitlement is not a right of the person who is established abroad in exercise of his or her right to freedom of movement.

32 Second, both the Austrian Government and the Commission argue that advances on maintenance under the UVG are based on a right of the child in respect of an obligation owed by the parent, that right being one of maintenance and a matter of family law. The fact that the Federal Austrian State, stepping into the shoes of the person who has defaulted on the obligation of maintenance, makes the maintenance payments and becomes subrogated to the right of the child to whom maintenance is owed does not in any way change the content of that right. This mechanism is simply intended to alleviate the procedure for enforcing maintenance obligations in order to guarantee the child payment of the whole amount of the maintenance payments and thus has a purpose other than that of meeting family expenses.

33 More particularly, according to the Commission, advances on maintenance payments are not granted definitively under the UVG since the person owing the maintenance must repay them, possibly following a procedure for enforcement. Relying on the judgment in Case 39/76 *Mouthaan* [1976] ECR 1901, paragraph 18 et seq., the Commission maintains that a benefit granted in place of a civil law obligation does not fall within the scope of Article 4(1)(h) of Regulation No 1408/71.

Findings of the Court

34 As far as the identity of the beneficiary of the right is concerned, the distinction between personal rights and derived rights does not in principle apply to family benefits (see *Hoever and Zachow*, cited above, paragraph 33). It does not therefore matter that the recipient of the benefit is the child himself since, as a

self-employed worker, the parent having custody of the child is a person covered by Regulation No 1408/71.

35 It follows that, as members of the family of a worker (in the present case their mother) and thus being persons covered by Regulation No 1408/71, as defined by Article 2(1) thereof, children in a situation such as that of the applicants in the main proceedings must, in the field of family benefits, be regarded as persons to whom the provisions of that regulation are applicable in terms of Article 3(1) of the same regulation.

36 Consequently, the Austrian Government's argument that the UVG establishes a self-standing right, granted to the child himself rather than to a worker exercising his or her right to freedom of movement, cannot be accepted.

37 As regards the legal nature of a benefit such as that in question here, the way in which it is classified under domestic law is not determinative in assessing whether or not it is covered by Regulation No 1408/71 (see *Hughes*, paragraph 14, and *Hoever and Zachow*, paragraph 17). It follows that the fact that a benefit is governed by the family law of a Member State is not decisive in evaluating its constituent elements.

38 In analysing the constituent elements of the benefit, it must be recalled that, according to Article 1(u)(i) of Regulation No 1408/71, '*family benefits* means all benefits in kind or in cash intended to meet family expenses'. In this regard, the Court has held that family benefits are intended to provide social assistance for

workers with dependent families in the form of a contribution by society towards their expenses (see Case 104/84 *Kromhout* [1985] ECR 2205, paragraph 14).

39 Thus, the Court has held that a child-raising allowance intended to enable one of the parents to devote himself or herself to the raising of a young child and, more particularly, to remunerate the service of bringing up a child, to meet other costs of caring for and bringing up a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from full-time employment had the aim of meeting family expenses within the meaning of Article 1(u)(i) of Regulation No 1408/71 (see *Hoever and Zachow*, cited above, paragraphs 23 and 25).

40 In this regard, it must be emphasised that meeting such family expenses is compatible with the aims mentioned in the first recital in the preamble to Regulation No 1408/71, namely improving the standard of living and conditions of employment of persons who have exercised their right to freedom of movement.

41 It follows that the expression 'to meet family expenses' in Article 1(u)(i) of Regulation No 1408/71 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 (*Unterhalt*) of children.

42 As regards the purposes of the advance in question in the main proceedings and the conditions on which it is granted, the reasons given by the Austrian legislature when adopting the UVG were to look after young people by taking 'a decisive step in ensuring the maintenance of minor children' where — as in the case now before the national court — their mothers are left to cope alone with their children and, in addition to the heavy burden of raising their children, find themselves faced with the additional difficulty of obtaining maintenance for their children from the father. According to the national court, attenuating such a situation is the reason for which 'the State must step in and take the place of the person in default of payment of maintenance, pay advances on maintenance and

seek recovery from the person in default'. The very title of the UVG directly reflects the purposes of the statute in relation to the maintenance of children.

43 The advances in question also give a family budget an immediate cash boost, which leads to the improvement of the family's standard of living. Without such advances, the parent having custody of children must use personal income to make up the loss resulting from the non-payment of maintenance by the other parent in default as well as paying the costs of enforcement proceedings against the other parent, all of which might have a further adverse affect on family life.

44 The contribution resulting from the advances in question is not therefore to be regarded as being provisional. From the recipient's point of view, maintenance payments are awarded definitively, with no account being taken of the risk of non-recovery from the parent in default.

45 The advances in question are not simply intended to speed up the procedure for enforcing maintenance obligations but are also intended to relieve the financial burden borne by the parent awarded custody of children. Article 4 of Regulation No 1408/71 does not exclude the possibility that a benefit might fulfil a dual function (*Hughes*, cited above, paragraph 19).

46 Moreover, as the Court has already held, the method by which a benefit is financed does not affect its classification as a social security benefit (see, in this regard, *Hughes*, cited above, paragraph 21). It does not matter by what legal mechanism the Member State implements the benefit. Consequently, the fact that, as in the present case, the public contribution takes the form of advances on maintenance paid by a public fund in the place of the defaulting debtor is of no consequence.

47 It follows from all the foregoing considerations that an advance on maintenance payment, such as that in question in the main proceedings, constitutes a family benefit.

48 That conclusion is not affected by paragraph 18 et seq. of the judgment in *Mouthaan*, cited above. In that case, the benefit in question consisted of the payment by the competent social security institution of arrears of wages due to a worker by his employer who had become insolvent. In paragraph 20 of that judgment, the Court held that, since the arrears in question corresponded to contributions made by the worker in the course of his employment, they were not unemployment benefits in terms of Article 4(1)(g) of Regulation No 1408/71. To be entitled to that benefit, it did not matter whether or not the worker was unemployed.

49 The answer to the first question referred for a preliminary ruling must therefore be that a benefit such as the advances on maintenance payments provided for by the UVG constitutes a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71. Consequently, persons residing in the territory of a Member State to which the provisions of that regulation apply are entitled, in accordance with Article 3 of that regulation, to receive such a benefit under the legislation of that Member State on the same conditions as that State's nationals.

The second question

50 Since the first question has been answered in the affirmative, it is unnecessary to reply to the second question submitted by the national court.

Costs

51 The costs incurred by the Austrian and Swedish 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 action 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 Oberster Gerichtshof by order of 23 February 1999, hereby rules:

A benefit such as the advances on maintenance payments provided for by the Austrian Bundesgesetz über die Gewährung von Vorschüssen auf den Unterhalt

von Kindern (Unterhaltsvorschußgesetz) (Federal Austrian Law on the Grant of Advances on Maintenance for Children) constitutes 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. Consequently, persons residing in the territory of a Member State to which the provisions of that regulation apply are entitled, in accordance with Article 3 of that regulation, to receive such a benefit under the legislation of that Member State on the same conditions as that State's nationals.

La Pergola Wathelet Edward

Jann Sevón

Delivered in open court in Luxembourg on 15 March 2001.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber