JUDGMENT OF THE COURT (Second Chamber)

20 October 2011 *

In Case C-225/10,

REFERENCE for a preliminary ruling under Article 267 TFEU, from the Sozialgericht Nürnberg (Germany), made by decision of 26 April 2010, received at the Court on 10 May 2010, in the proceedings

Juan Perez Garcia,

Jose Arias Neira,

Fernando Barrera Castro,

Dolores Verdún Espinosa, successor in title to José Bernal Fernández,

v

Familienkasse Nürnberg,

* Language of the case: German.

THE COURT (Second Chamber),

composed of J.N. Cunha Rodrigues, President of the Chamber, U. Lõhmus, A. Rosas, A. Ó Caoimh (Rapporteur) and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,
Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 14 April 2011,

after considering the observations submitted on behalf of:

— Mr Barrera Castro, by A. González Maeztu, head of section in the Spanish consulate at Frankfurt am Main,

— the German Government, by N. Graf Vitzthum, acting as Agent,

— the Spanish Government, by B. Plaza Cruz and S. Centeno Huerta, acting as Agents,

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

after hearing the Opinion of the Advocate General at the sitting on 9 June 2011

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Articles 77 and 78 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), as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December (OJ 2006 L 392, p. 1, 'Regulation 1408/71').

2 The reference has been made in four sets of proceedings between Mr Pérez García, Mr Arias Neira, Mr Barrera Castro and Ms Verdún Espinosa, as successor in title to Mr Bernal, and the Familienkasse Nürnberg (Family Assistance Fund, Nuremberg) concerning the latter's refusal to grant them the benefit of the allowances for dependent children in respect of their handicapped adult children.

Legal context

European Union legislation

3 Article 1(u) of Regulation No 1408/71 provides that, for the purposes of its application:

'(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;

(ii) "family allowances" means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family.'

4 In the words of Article 4(1)(h) of that regulation, the regulation is to apply to 'all legislation concerning the following branches of social security … family benefits.'

5 According to Article 10(a)(1) of Regulation No 1408/71, the provisions of Title III of that regulation are not to apply to special non-contributory cash benefits, the persons to whom this regulation applies being granted those benefits 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.

6 Annex IIa of Regulation No 1408/71, entitled 'Special non-contributory cash benefits', includes the following in section 'H. Spain':

'(a) Minimum income guarantee [Law No 13/1982 on the social integration of handicapped persons (Ley 13/1982 de Integración Social de los Minusválidos), of 7 April 1982 (BOE No 103, 30 April 1982, p. 11106)];

...

(c) Non-contributory invalidity and retirement pension provided for in Article 38(1) of [Legislative Decree 1/1994 on the approval of the consolidated text of the general law on social security (Real Decreto Legislativo 1/1994 por el que se aprueba el texto refundido de la Ley General de Seguridad Social), of 20 June 1994 (BOE No 154, 29 June 1994, p. 20658)].

...'

7 As may be seen from its title, Title III of Regulation No 1408/71 lays down provisions specific to the various categories of benefits.

8 Appearing in Chapter 7, entitled 'Family benefits', of Title III, Article 76 of Regulation No 1408/71, itself entitled 'Rules or 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', is worded as follows:

'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.'

9 Still in Title III, Chapter 8 thereof, entitled 'Benefits for dependent children of pensioners and for orphans', includes Article 77 worded as follows:

'1. The term "benefits", for the purposes of this Article, shall mean family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases.

2. Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children are residing:

(a) to a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension;

(b) to a pensioner who draws pensions under the legislation of more than one Member State:

(i) in accordance with the legislation of whichever of these States he resides in provided that, taking into account where appropriate Article 79 (1) (a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State, or

…'

10 Also appearing in Chapter 8, Article 78 of Regulation No 1408/71, entitled 'Orphans', provides:

'1. The term "benefits", for the purposes of this Article, means family allowances and, where appropriate, supplementary or special allowances for orphans […].

2. Orphans' benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the orphan or the natural or legal person actually maintaining him is resident:

(a) for the orphan of a deceased employed or self-employed person who was subject to the legislation of one Member State only in accordance with the legislation of that State;

(b) for the orphan of a deceased employed or self-employed person who was subject to the legislation of several Member States:

(i) in accordance with the legislation of the Member State in whose territory the orphan resides provided that, taking into account, where appropriate, Article 79(1) (a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State; or

…'

11 In the words of Article 5 of Regulation No 1408/71, '[t]he Member States shall specify … the benefits referred to in Article 77 and 78 in declarations to be notified and published …'.

12 In its declaration made pursuant to Article 5 (OJ 2003, C 210, p. 1), the Federal Republic of Germany stated that the child benefits paid to the children of persons receiving pensions under the Federal law on child allowances (Bundeskindergeldgesetz, 'BKGG'), constitute family benefits referred to in Articles 77 and 78 of Regulation No 1408/71.

13 In its declaration made on the same basis (OJ 2005, C 79, p. 9), the Kingdom of Spain stated that family benefits and benefits for orphans provided for by legislative decree 1/1994 fell within those provisions.

National legislation

German legislation

14 The BKGG, in the version published on 28 January 2009 (BGBl. 2009 I, p. 142), grants pensioners the right to allowances for dependent children until they reach the age of 18 years, or, in some circumstances, 25 years (the 'German dependent child benefit'). For handicapped children incapable of supporting themselves, the BKGG provides that that allowance is paid without any age limit if the handicap was established before the age of 25 years. The amount of the allowance depends on the number of dependent children.

Spanish legislation

15 According to the order for reference, on reaching the age of 18 years, handicapped children may apply for a non-contributory invalidity pension in the form of a special allowance under Law 13/1982 (the 'Spanish non-contributory benefit for handicapped persons').

16 Moreover, Legislative Decree 1/1994 provides for the payment to persons receiving pensions who reside in the national territory of an allowance for each dependent child residing in the same territory up to the age of 18 years, provided that the family income does not exceed a specified ceiling and that neither of the parents has the right to the same type of benefits coming under another public social protection system (the 'Spanish dependent child benefit'). That benefit is paid for life for each

handicapped child whose degree of incapacity is equal to or higher than 65 %, regardless of age and without a resources ceiling. A degree of incapacity equal to or higher than, respectively, 33 %, 65 % and 75 % leads to a corresponding increase in the basic amount of the benefit. In the case of a handicapped child, however, that benefit is not granted if that handicapped child receives an analogous benefit provided for by another public social security system, a 'special aid' granted pursuant to Law 13/1982 or a 'non-contributory invalidity pension', the interested person having in this respect to make a choice in favour of one of these benefits declared incompatible.

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

17 According to the order for reference, Mr Pérez García, Mr Arias Neira, Mr Barrera Castro and Mr Bernal Fernández, the latter having died during the main proceedings, are Spanish nationals residing in Spain who worked in Germany as migrant workers. On that basis, each of them received an old-age and/or invalidity pension both in Spain and in Germany, the latter State granting them the right to a 'national' pension on the basis of the provisions of German law alone. Furthermore, each of them is or was the father of a handicapped child of over the age of 18 years. According to the order for reference, in respect of the handicap of their children, in Spain the Spanish non-contributory benefit for handicapped persons provided for by Law 13/1982 is granted, but not the Spanish dependent child benefit provided for by Legislative Decree 1/1994.

18 By decisions adopted between the months of November 2007 and June 2008, the Familienkasse Nürnberg, as appropriate, refused or revoked payment to Mr Pérez García, Mr Arias Neira, Mr Barrera Castro and Mr Bernal Fernández of the German dependent child benefit, on the ground, in essence, that they are entitled in Spain to family benefits that exceed the corresponding benefit which is paid to them in

Germany and that they may therefore at any time apply for those allowances. The determining factor in this respect is that the Spanish family benefits are payable even if the handicapped child may not, in such a case, receive the Spanish non-contributory benefit for handicapped persons.

19 Their objection to those decisions having been rejected on 20 November 2008, Mr Pérez García, Mr Arias Neira, Mr Barrera Castro and Mr Bernal Fernández, each so far as he was concerned, brought an action before the Sozialgericht (Social Court) Nüremberg seeking to obtain payment of the German dependent child benefit. Mr Bernal Fernández having died on 20 April 2009, Mrs Verdún Espinosa, his widow, continued the proceedings as his survivor.

20 In its decision to refer, that court considers that in all the cases at issue before it, the right to Spanish dependent child benefit is 'acquired,' as provided for in Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71 since the legal conditions for granting such benefits are fulfilled. Consequently, since the right to those benefits is precluded only because the parents of the handicapped child have taken advantage of an option provided for by Spanish national law, that court is inclined to take the view that receiving the Spanish non-contributory benefit for handicapped children prohibits interested persons from claiming the German dependent child benefit from the Member State which, not being the Member State of residence, is involved only in the alternative under those provisions.

21 According to the referring court, there is no infringement of migrant workers' freedom of movement. Indeed, it is true that when a person who receives a Spanish pension and a German pension moves his residence from Germany to Spain, he forfeits his priority entitlement to the German dependent child benefit under Article 77(2)(b)(i) of Regulation No 1408/71 in respect of the former Member State of residence, but he would acquire, under the same provision, a priority entitlement to

benefits for dependent children, which are higher, in the new Member State of residence. That would also be true under Article 78(2)(b)(i) of that regulation.

22 The referring court finds, on the other hand, that an entitlement to the German dependent child benefit may be given up to an amount equal to the difference between the benefits concerned if the handicapped child who receives a Spanish non-contributory benefit for handicapped persons is not or is no longer considered to be a dependent person in Spain. That would, for example, be the case if the handicapped child ceased to live together permanently with his parents in order to occupy a home of his own or to join a therapeutic community. Indeed, in such a case, all possibility of choosing between the Spanish dependent child benefit and the Spanish non-contributory benefit for handicapped persons is excluded.

23 In those circumstances, the Sozialgericht (Social Court) Nürnberg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 77(2)(b)(i) of Regulation … No 1408/71 to be interpreted as meaning that family allowances need not be granted by the former State of employment to persons who receive pensions for old age, invalidity or an accident at work or occupational disease under the legislation of more than one Member State (double or multiple pension holders) and whose pension entitlement is based on the legislation of the former State of employment (national pension entitlement) if provision is made in the State of residence for a comparable, higher benefit, which is, however, incompatible with another benefit for which the person concerned, having been given the choice, has opted?

(2) Is Article 78(2)(b)(i) of Regulation … No 1408/71 to be interpreted as meaning that family allowances for orphans of a deceased employed or self-employed person who was subject to the legislation of several Member States and who enjoyed a notional entitlement to an orphan's pension based on the legislation of the former State of employment (potential national pension entitlement) need not be granted by the former State of employment if provision is made in the State of residence for a comparable, higher benefit, which is, however, incompatible with another benefit for which the person concerned, having been given a choice, has opted?

(3) Does the same apply to a benefit under Article 77 or Article 78 of Regulation … No 1408/71 for which provision is generally made in the children's State of residence, but for which the person concerned, as someone who is not being given a choice, cannot opt?'

Consideration of the questions referred

The first two questions

24 By its first two questions, which should be considered together, the national court asks, in essence, whether Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that recipients of old-age or invalidity pensions, or the orphan of a deceased worker, having been subject to the legislation of several Member States, but whose pension or orphan's rights are based on the legislation of the former Member State of employment alone, are entitled to claim from the competent authorities of that State the family allowances provided for by that legislation for handicapped children, even though they did not in the Member State of residence

seek the comparable, higher, allowances under the legislation of that latter State, because they had opted to be granted another benefit for handicapped persons that is incompatible with those.

25 Those questions are raised in the context of disputes in which, as is apparent from paragraph 17 of this judgment, the recipients of the pensions at issue and also the orphan concerned ('the interested persons') had chosen to be granted a non-contributory benefit for handicapped persons from the competent institutions of their Member State of residence, the payment of which, under the rules of internal law of that State, excluded the receipt of benefits provided for dependent children, including handicapped children.

26 In such circumstances, the competent authorities of the former Member State of employment take the view that it follows from Article 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71 that solely the Member State of residence is required to grant family allowances to interested persons, in so far as, in accordance with those provisions, a right to such benefits is 'acquired' under the legislation of that Member State, all the legal conditions for granting those benefits being met, even if the interested persons have chosen not to claim them.

27 Although the Spanish Government states, in its written observations, that the Spanish non-contributory benefit for handicapped persons to which the order for reference refers is provided, not under Law 13/1982, but under Legislative Decree 1/1994, it none the less concedes that that fact does not affect the relevance of the questions raised since, in any event, irrespective of the nature of the benefit chosen by the interested persons in Spain, each of them is, as is apparent from paragraph 16 of the

present judgment, incompatible with the Spanish dependent child benefit provided for by that Legislative Decree for handicapped children.

28 At the outset, in the present case it must be ascertained whether, as the referring court assumes, at least one of the social benefits at issue in the main proceedings falls within Articles 77 and 78 of Regulation No 1408/71. Indeed, if that were not the case, the questions raised by that court concerning the interpretation of those provisions would be irrelevant.

The benefits referred to in Articles 77 and 78 of Regulation No 1408/71

29 According to paragraph 1 of Articles 77 and 78 of Regulation No 1408/71 the 'benefits' which are referred to there are 'family allowances' and, where appropriate, in the case of orphans, supplementary or special allowances provided for them.

30 Yet, under Article 1(u)(ii) of that regulation, the wording 'family allowances' means, for the purposes of the application of that regulation, periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family.

31 Consequently, the 'family allowances' for which Articles 77 and 78 provide payment, are solely those benefits that match that definition, to the exclusion of any other family benefit for dependent children (see, to that effect, Case 313/86 *Lenoir* [1988] ECR I-5391, paragraphs 10 and 11; Case C-33/99 *Fahmi and Esmoris Cerdeiro-Pinedo*

Amado [2001] ECR I-2415, paragraphs 33 to 35; and Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, paragraphs 41 and 42).

32 In the circumstances of the present case, it is necessary to note, first, that the Spanish non-contributory benefit for handicapped persons which the interested persons chose in their Member State of residence, whether it is a 'non-contributory invalidity pension' under Legislative Decree 1/1994 or a 'special aid' under Law 13/1982, is included in Annex IIa of Regulation No 1408/71, which sets out, in section H, special non-contributory Spanish benefits which are precluded, under Article 10a of that same regulation, from Title III of it. It is not disputed that that benefit constitutes a special non-contributory benefit. Consequently, that benefit does not fall within the concept of 'family allowances' within the meaning of Article 1(u)(ii) of that regulation and therefore does not constitute a 'benefit' coming under Articles 77 and 78 of that regulation.

33 Nor, moreover, is it contested that the German dependent child benefit provided in the former Member State of employment of the workers concerned for handicapped children, mentioned by the Federal Republic of Germany in its declaration made under Article 5 of Regulation No 1408/71 as being one of the benefits covered by Articles 77 and 78 of that regulation, constitutes a benefit falling within 'family allowances' for the purposes of that Article 1(u)(ii).

34 By contrast, the European Commission, in essence like Mr Barrera Castro, claims that, contrary to what the referring court assumes in its questions, the Spanish dependent child benefit paid to parents of handicapped children under Legislative Decree 1/1994 does not fall under Articles 77 and 78. Indeed, that benefit cannot be considered to be granted exclusively on the basis of the number, and, as the case may be, the age of members of the family, since supplementary or different criteria are also decisive, namely, the handicap and its degree or severity. That analysis is borne out by the incompatibility of that benefit with the benefit provided for by Law

13/1982. Indeed, such an incompatibility under national law can be explained only by the Spanish legislature finding that those two benefits are similar, or at the very least, pursue the same objective.

35 The fact remains, however, that in its declaration made in accordance with Article 5 of Regulation No 1408/71, the Kingdom of Spain expressly stated that the Spanish dependent child benefit and the benefits for orphans provided for by Legislative Decree 1/1994 constitute benefits covered, respectively, by Articles 77 and 78 of that regulation.

36 As the Court has already held, although the fact that certain benefits for dependent children of pensioners granted under a national law or regulation were not mentioned in the declaration referred to in Article 5 of Regulation No 1408/71 cannot, by itself, establish that those benefits do not constitute benefits for the purposes of Articles 77 and 78 of that regulation, it must on the other hand be stated that where such benefits were mentioned in that declaration they are to be regarded as benefits covered by those provisions (see, to that effect, Case C-251/89 *Athanasopoulos and Others* [1991] ECR I-2797, paragraph 28).

37 It follows that, just like the German dependent child benefit provided for in the former Member State of employment of the interested persons, the Spanish dependent child benefit provided for by Legislative Decree 1/1994 in the Member State of residence constitutes one of the 'family allowances' as provided for in Article 1(u)(ii) of Regulation No 1408/71 and, therefore, a benefit coming under Articles 77 and 78 of that regulation.

38 In those circumstances, as the referring court requests, it is necessary to consider whether the competent institutions of the former Member State of employment may refuse to pay the interested parties the family allowances to which they are entitled under the national laws of that Member State alone, on the ground that, according to Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71, it is their new Member State of residence that is thereafter exclusively competent to pay those allowances, if those interested persons have left their former Member State of employment to return to their Member State of origin.

The Member State competent to pay the family allowances

39 It should be recalled in that regard that, under Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71, where a pensioner or a deceased worker has been subject to the laws of more than one Member State, the allowances in question are to be paid in accordance with those of the State in whose territory the pensioner, or the orphan of the deceased worker, resides. The Member State of residence is accordingly specified by the provisions of Regulation No 1408/71 as having sole competence to grant the family allowances in question (see, to that effect, Case C-59/95 *Bastos Moriana and Others* [1997] ECR I-1071, paragraphs 15 and 18).

40 However, according to the very wording of those provisions of Regulation No 1408/71, it is only when a right to family allowances is 'acquired' under the legislation of the Member State of residence that the latter is designated by Regulation No 1408/71 as the competent State.

41 The assessment of that last condition, which is a question of national law, is a matter for the national court (see Case C-471/99 *Martínez Domínguez and Others* [2002] ECR I-7835, paragraph 25).

42 In the present case, however, the referring court seeks precisely to determine the scope of the word 'acquired' for the purpose of Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71. It seeks to ascertain whether the right to family allowances provided for in the Member State of residence may be considered to be 'acquired', for the purposes of those provisions, when that right is excluded only by reason of the interested persons' own choice to be granted another benefit incompatible with those family allowances, those interested persons having exercised, in that respect, a right of option provided for by national law. Such a question of interpretation of a rule of EU law clearly falls within the exclusive jurisdiction of the Court.

43 As is apparent from the case-law of the Court, for it to be possible to regard family allowances as being 'acquired' under the legislation of a Member State, the law of that State must recognise the right to the payment of benefits in favour of the member of the family who works or worked in that State, those benefits being accordingly due under that legislation (see, by analogy Case 134/77 *Ragazzoni* [1978] ECR 963, paragraph 8; and Case 191/83 *Salzano* [1984] ECR 3741, paragraph 7).

44 According to similarly established case-law of the Court, the recognition of such a right requires that the interested person should fulfil all the conditions, as to both form and substance, imposed by the national legislation of that State in order to be able to exercise that right, which may in some cases include the condition that a prior application must have been made for the payment of such benefits (see, by analogy, *Ragazzoni*, paragraphs 8 and 9; *Salzano*, paragraphs 7 and 10; Case 153/84 *Ferraioli* [1986] ECR 1401, paragraph 14; Case C-117/89 *Kracht* [1990] ECR I-2781, paragraph 11; and Case C-119/91 *McMenamin* [1992] ECR I-6393 paragraph 26).

45 Where, as in the case in the main proceedings, family allowances provided by the national rules of the Member State of residence may not be requested by the interested persons because they have opted for another benefit, the grant of which excludes payment of those allowances, it follows that the right of those persons, as the Spanish Government maintains and as the German Government indeed acknowledges, cannot be considered to be 'acquired' for the purposes of Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71. Indeed, those interested persons do not meet all the conditions of form and of substance to be granted those allowances.

46 In such circumstances, the rule set out in those provisions of Regulation No 1408/71, that the Member State of residence of the interested persons is exclusively competent to grant family allowances to pensioners, or orphans of a deceased worker, having been subject to the legislation of several Member States, is therefore not applicable.

47 The German Government claims however that where, as in the case in the main proceedings, the right to family allowances in the Member State of residence is excluded solely because the interested persons have opted for another benefit in that same State, Article 76(2) of Regulation No 1408/71 should be applied by analogy. Transposed to the case here, the application of that provision means that the competent German institutions could act as if the interested persons had chosen to receive the family allowances provided for by the Spanish legislation, thus excluding the right to family allowances provided for by the German legislation. That analogy is called for, first, based on the comparability of the interests at stake, since dependent children of pensioners should be treated in the same way as dependent children of workers. Second, it is also supported by the meaning and purpose of Article 76(2). Indeed, that provision is intended not only to avoid the overlapping of benefits, but also to ensure an equitable sharing of burdens between Member States. The fact that intentionally no application is made for the payment of family benefits ought not, therefore, to

entail the transfer of the obligation to grant them from the Member State of priority in that respect to that which is competent only in the alternative.

48 That argument cannot, however, be accepted.

49 It is true that, after the period of the facts of the case which gave rise to the judgments cited in paragraphs 43 and 44 of this judgment, Article 76 of Regulation No 1408/71, in the version then in force, to which those judgments related, was amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1) so as to include paragraph 2 designed to allow the Member State of employment to suspend the right to family benefits if an application for obtaining payment of those benefits was not made in the Member State of residence and, consequently, no payment was made by the latter.

50 However, that fact does not deprive the case-law of its usefulness in interpreting Articles 77 and 78 of Regulation No 1408/71. Indeed, unlike the previous version of Article 76 of Regulation No 1408/71, which concerns cases of overlapping entitlements to family benefits where such benefits are due because professional activity has been carried out in the Member State of residence of family members and under the legislation of the other Member State, those Articles 77 and 78 concerning the right to family allowances of pensioners and orphans of deceased workers were not supplemented by Regulation No 3427/89, which none the less amended in several respects the version then in force of Regulation No 1408/71 on the grant of family benefits (see, to that effect, Case C-16/09 *Schwemmer* [2010] ECR I-9717, paragraph 57).

51 Furthermore, and above all, the European Union legislation on the coordination of national social security legislations, taking account in particular of its underlying objectives, cannot, except in the case of an express exception in conformity with those

objectives, be applied in such a way as to deprive a migrant worker, or those claiming under him, of benefits granted under the legislation of a single Member State on the basis solely of the insurance periods completed under that legislation (see, to that effect, in particular, Case 9/67 *Colditz* [1967] ECR 229, 234; Case 100/78 *Rossi* [1979] ECR 831, paragraph 14; *Schwemmer*, paragraph 58 and the case-law cited, and Case C-388/09 *da Silva Martins* [2011] ECR I-5737, paragraph 75).

52 Accordingly, as regards Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71, the Court has already held that those provisions cannot be interpreted in such as way as to deprive the worker, or the orphan of a deceased worker, of entitlement to more favourable benefits, by the substitution of benefits granted in the Member State of the new residence for benefits previously acquired solely by reason of the legislation of another Member State (see, to that effect, in particular Case 733/79 *Laterza* [1980] ECR-1915, paragraphs 9 and 10; Case 807/79 *Gravina* [1980] ECR-2205, paragraph 8; Case 320/82 *D'Amario* [1983] ECR-3811, paragraph 5; Case 269/87 *Ventura* [1988] ECR-6411, paragraph 14; and *Bastos Moriana and Others*, paragraph 16).

53 In the case in the main proceedings, it is common ground that, as is apparent from the actual wording of the questions raised by the referring court, each of the interested parties had a right to a pension in Germany acquired on the basis of German legislation alone by reason of insurance periods completed in that Member State.

54 In those circumstances, Articles 77 and 78 of Regulation No 1408/71 cannot be interpreted as meaning that the former Member State of employment may refuse to pay to the interested persons the family allowances acquired under the legislation of that State alone, on the sole ground that those interested persons ought to have applied for the higher family allowances in their Member State of residence.

55 Consequently, given that, in the case in the main proceedings, it is common ground that, as is apparent from paragraphs 39 to 46 of this judgment, the right to family allowances is not 'acquired' by interested persons under the legislation of the Member State of residence, it is for the competent institutions of the former Member State of employment, in which a right to such family allowances was acquired on the basis of the legislation of that State alone, to pay the entire amount of those allowances according to the conditions and limits set by that legislation (see, to this effect, Case C-113/96 *Gómez Rodríguez* [1998] ECR I-2461, paragraph 32; and *Martínez Domínguez and Others*, paragraphs 21 and 22).

56 In the light of the foregoing, the answer to the first two questions is that Articles 77(2)(b)(i) and 78(2)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that recipients of an old-age and/or invalidity pension, or the orphan of a deceased worker, to whom the legislation of several Member States applied, but whose pension or orphan's rights are based on the legislation of the former Member State of employment alone, are entitled to claim from the competent authorities of that State the full amount of the family allowances provided under that legislation for handicapped children, even though they have not, in the Member State of residence, applied for the comparable, higher, allowances under the legislation of that latter State, because they opted to be granted another benefit for handicapped persons which is incompatible with those, since the right to family allowances in the former Member State of employment was acquired by reason of the legislation of that State alone.

The third question

57 Having regard to what has been stated in paragraphs 39 to 46 of this judgment, the response given by the Court in the preceding paragraph applies *mutatis mutandis* to a situation in which the interested persons are not able, under the legislation of the

Member State of residence, to opt for payment of family allowances in that State, on the ground, for example, that the children concerned can no longer be considered as being dependent on their parents.

58 Indeed, in that situation also, the right to family allowances cannot be considered to be 'acquired' for the purposes of Articles 77(2)(a) and 78(2)(a) of Regulation No 1408/71 in the Member State of residence, since the referring court itself establishes that, in such a situation, the substantive requirements for granting those allowances provided for by national law have not been met, so that those benefits are not due.

59 Consequently, the answer to the third question is that the answer to it is the same as that to the first two questions where, under the legislation of the Member State of residence, the interested persons are unable to opt for payment of family allowances in that State.

Costs

60 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 (Second Chamber) hereby rules:

1. **Articles 77(2)(b)(i) and 78(2)(b)(i) 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, as amended by Regulation (EC) No 1992/2006 of the European Parliament and of the Council of 18 December 2006 must be interpreted as meaning that recipients of old age and/or invalidity pensions, or the orphan of a deceased worker, to whom the legislation of several Member States applied, but whose pension or orphan's rights are based on the legislation of the former Member State of employment alone, are entitled to claim from the competent authorities of that State the full amount of the family allowances provided under that legislation for handicapped children, even though they have not, in the Member State of residence, applied for comparable, higher, allowances under the legislation of that latter State, because they opted to be granted another benefit for handicapped persons which is incompatible with those, since the right to family allowances in the former Member State of employment was acquired by reason of the legislation of that State alone.**

2. **The answer to the third question is that the answer to it is the same as that to the first two questions where, under the legislation of the Member State of residence, the interested persons are unable to opt for payment of family allowances in that State.**

[Signatures]