JUDGMENT OF THE COURT (Fourth Chamber)
29 April 2004 *

In Case C-160/02,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Friedrich Skalka

and

Sozialversicherungsanstalt der gewerblichen Wirtschaft,

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

* Language of the case: German.

THE COURT (Fourth Chamber),

composed of: J.N. Cunha Rodrigues, President of the Chamber, J.-P. Puissochet (Rapporteur) and F. Macken, Judges,

Advocate General: J. Kokott,
Registrar: M.-F. Contet, Principal Administrator,

after considering the written observations submitted on behalf of:

— the Sozialversicherungsanstalt der gewerblichen Wirtschaft, by P. Bachmann, Rechtsanwalt,

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

— the German Government, by W.-D. Plessing, acting as Agent,

— the Netherlands Government, by H.G. Sevenster, acting as Agent,

— the Finnish Government, by T. Pynnä, acting as Agent,

— the United Kingdom Government, by J.E. Collins, acting as Agent, and E. Sharpston QC,

— the Commission of the European Communities, by G. Braun and H. Michard, 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 United Kingdom Government, represented by C. Jackson, acting as Agent, and by E. Sharpston, and of the Commission, represented by G. Braun, at the hearing on 23 October 2003,

after hearing the Opinion of the Advocate General at the sitting of 25 November 2003,

gives the following

Judgment

1 By order of 26 March 2002, received at the Court on 30 April 2002, the Oberster Gerichtshof (Supreme Court) referred for a preliminary ruling under Article 234 EC a question on the interpretation of Articles 4(2a) and 10a of, and Annex IIa to,

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 question was posed in proceedings between Mr Skalka and the Sozialversicherungsanstalt der gewerblichen Wirtschaft (Social Insurance Institution for Trade and Commerce) ('the Sozialversicherungsanstalt') concerning that institution's refusal to grant Mr Skalka the 'compensatory supplement' to his retirement pension provided for by the Gewerbliche Sozialversicherungsgesetz (Federal Law of 11 October 1978 — 'the GSVG').

Legal background

Community legislation

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

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

. . . . . .

...

(c) old-age benefits;

...'

4 Under Article 4(2a), the regulation applies to special non-contributory benefits which are provided under legislation or schemes other than those referred to in Article 4(1) or excluded under Article 4(4), where such benefits are intended inter alia to provide supplementary, substitute or ancillary cover against the risks covered by the branches referred to in Article 4(1)(a) to (h).

5 Article 10a(1) of Regulation No 1408/71 provides:

'Notwithstanding the provisions of Article 10 and Title III, persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.'

6 In Annex IIa to Regulation No 1408/71, entitled 'Special non-contributory benefits', the following is listed at (a) under 'Point K, Austria':

'Compensatory supplement (Federal Act of 9 September 1955 on General Social Insurance — ASVG, Federal Act of 11 October 1978 on Social Insurance for

Persons engaged in Trade and Commerce — GSVG and Federal Act of 11 October 1978 on Social Insurance for Farmers — BSVG)'.

National legislation

7 The Austrian pension insurance system is intended to provide the person insured, in old age and in the event of impaired capacity for work, with a benefit linked to that person's standard of living before retirement or invalidity.

8 If the level of pension benefit is not sufficient to ensure an appropriate way of life, known as the 'standard rate', where the period of insurance is too short or the basis of assessment applied is too low, Austrian law provides for payment of a compensatory supplement. The compensatory supplement system is governed, in a situation such as that in the main proceedings, by the Federal Law of 9 September 1955 on General Social Insurance and by the GSVG.

9 If the pension plus, in accordance with Paragraph 150 of the GSVG, other net income received by the pensioner and any other amount to be taken into account falls short of the standard rate, the pensioner is entitled, under Paragraph 149(1) of the GSVG, as long as he is habitually resident in Austria, to a compensatory supplement equal to the difference between the standard rate and his personal income.

10 That supplement can only be paid to a person receiving a pension under the statutory pension insurance scheme and is a benefit ancillary to that pension. It is calculated automatically by the administration when the pension is claimed without need for a separate application and is paid by the insurance institution at the same time as the pension.

11 The financing of the compensatory supplement is governed by Paragraph 156 of the GSVG. Paragraph 156(1) provides that, notwithstanding the provisions of Paragraph 156(2), the compensatory supplement is to be reimbursed by the Austrian Land in which the head office of the social assistance agency which makes the payment to the recipient is situated. Under Paragraph 156(2), the Federation bears part of the costs of the payment of compensatory supplements and its participation in that cost is determined by the Finanzausgleichsgesetz (Law on the Equalisation of Financial Burdens).

12 Compensatory supplement is thus financed entirely by the Federation.

The main proceedings and the question referred for a preliminary ruling

13 The claimant in the main proceedings, Mr Skalka, is an Austrian national. Since 1 May 1990, he has received a disability pension paid by the Sozialversicherungsanstalt. Since he reached the age of 60, the same amount of benefit has been paid as an early retirement pension based on a long period of insurance.

14 Mr Skalka has been habitually resident in Tenerife (Spain) since the end of 1990. On 16 December 1999 he applied, on the basis of the GSVG, to the Sozialversicherungsanstalt for a compensatory supplement. On 12 October 2000 that institution refused his application on the ground that Mr Skalka had his habitual residence abroad and that the benefit in question could not be exported.

15 Mr Skalka brought an action to challenge that refusal. On the substance it was held, at first instance and on appeal, that the compensatory supplement was a special non-contributory benefit within the meaning of Article 10a of Regulation No 1408/71 and could not, according to that article, be granted to a person habitually resident in a Member State other than the Republic of Austria.

16 At both instances it was considered that there was no reason to request a preliminary ruling from the Court on the legal classification of the benefit under Regulation No 1408/71, on the ground that the judgment of the Court of Justice in Case C-215/99 *Jauch* [2001] ECR I-1901 gave a sufficient answer on that point.

17 Mr Skalka, considering that the question should have been referred to the Court of Justice for a preliminary ruling, appealed on a point of law to the Oberster Gerichtshof, which decided to stay the proceedings and refer the following question to the Court of Justice for a preliminary ruling:

'Is Article 10a of Regulation ... No 1408/71 ... , in conjunction with Annex IIa, to be interpreted as meaning that the compensatory supplement provided for under [the GSVG] falls within its scope and therefore constitutes a special non-

contributory benefit within the meaning of Article 4(2a) of the regulation, so that only the coordinating provisions laid down by Article 10a of the regulation are applicable to a person who, like the claimant, fulfils after 1 June 1992 the conditions for the granting of that benefit?'

The question referred for a preliminary ruling

18 By its question the referring court asks essentially whether the compensatory supplement provided for by the GSVG, a benefit included in Annex IIa to Regulation No 1408/71, constitutes a special non-contributory benefit within the meaning of Article 4(2a) of that regulation, so that the situation of a person who, like the claimant in the main proceedings, fulfils after 1 June 1992 the conditions for the granting of that benefit is governed with effect from 1 January 1995, the date of Austria's accession to the European Union, solely by the coordinating provisions in Article 10a of that regulation and the benefit can therefore be paid only to a person habitually resident in Austria.

19 The provisions in Article 10a of Regulation No 1408/71 derogating from the principle of the exportability of social security benefits must be interpreted strictly. That provision can apply only to benefits which satisfy the conditions defined in Article 4(2a) of Regulation No 1408/71, that is, benefits which are both special and non-contributory and which are listed in Annex IIa to that regulation (see Case C-215/99 *Jauch*, cited above, paragraph 21).

20 As stated in paragraph 6 above, the compensatory supplement is included in the list of special non-contributory benefits within the meaning of Article 4(2a) of Regulation No 1408/71, to which Annex IIa to that regulation applies.

21 It therefore remains to be examined whether, firstly, the benefit in question is special in nature and is intended to provide supplementary, substitute or ancillary cover against the risks covered by one or more of the branches of social security referred to in Article 4(1) of Regulation No 1408/71, and secondly whether such benefit is non-contributory.

Special benefit

22 For the Sozialversicherungsanstalt, all the governments which lodged observations and the Commission, the special benefits which fall under Article 4(2a) are special benefits of a mixed kind. They are characterised by the fact that they are connected partly to social security, in that they benefit as of right persons who fulfil the conditions for the grant of the social security benefits to which they are linked, and partly to social assistance, in the sense that they are not dependent on periods of work or contributions and that they are intended to relieve a clear need.

23 The Austrian compensatory supplement fulfils the criteria identified by the Court in its judgment in Case 313/86 *Lenoir* [1988] ECR 5391.

24 It ensures the provision of an income supplement to those persons receiving insufficient social security benefit by guaranteeing a minimum means of subsistence to those persons whose total income falls below a statutory threshold. As it is intended to guarantee a minimum subsistence income for pensioners, the benefit is by nature social assistance. Such a benefit is always closely linked to the socio-economic situation of the country concerned and its amount, fixed by law, takes account of the standard of living in that country. As a result its purpose would be lost if it were to be granted outside the State of residence.

25 A special benefit within the meaning of Article 4(2a) of Regulation No 1408/71 is defined by its purpose. It must either replace or supplement a social security benefit and be by its nature social assistance justified on economic and social grounds and fixed by legislation setting objective criteria (see to that effect Case C-20/96 *Snares* [1997] ECR I-6057, paragraphs 33, 42 and 43, Case C-297/96 *Partridge* [1998] ECR I-3467, paragraph 34, and Case C-43/99 *Leclère and Deaconescu* [2001] ECR I-4265, paragraph 32).

26 As all the interveners have stated, the Austrian compensatory supplement tops up a retirement pension or an invalidity pension. It is by nature social assistance in so far as it is intended to ensure a minimum means of subsistence for its recipient where the pension is insufficient. Its grant is dependent on objective criteria defined by law. Consequently, it must be classified as a 'special benefit' within the meaning of Regulation No 1408/71.

Non-contributory benefit

27 For the Sozialversicherungsanstalt, all the governments which have lodged observations and the Commission, the Austrian compensatory supplement is non-contributory in nature.

28 The relevant determining criterion is how the benefit is actually financed (see to that effect *Jauch*, cited above, paragraphs 32 and 33). The Court must consider whether that financing comes directly or indirectly from social contributions or from public resources.

29 In the case of the Austrian compensatory supplement, the costs are borne by a social institution which then receives reimbursement in full from the relevant Land, which in turn receives from the Federal budget the sums necessary to finance the benefit. At no time do the contributions of insured persons form part of this financing arrangement.

30 Consequently, it is established that the Austrian compensatory supplement must be regarded as being non-contributory within the meaning of Article 4(2a) of Regulation No 1408/71.

31 The answer to the question referred for a preliminary ruling by the Oberster Gerichtshof must therefore be that the provisions of Article 10a of Regulation No 1408/71 and those of Annex IIa thereto must be interpreted as meaning that the compensatory supplement, within the meaning of the GSVG, falls within the scope of that regulation and therefore constitutes a special non-contributory benefit within the meaning of Article 4(2a) of that regulation, so that the situation of a person who, after 1 June 1992, fulfils the conditions for the grant of that benefit is governed with effect from 1 January 1995, the date of the Republic of Austria's accession to the European Union, solely by the coordinating provisions laid down by Article 10a.

Costs

32 The costs incurred by the Austrian, German, Netherlands, Finnish and United Kingdom Governments 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 (Fourth Chamber),

in answer to the questions referred to it by the Oberster Gerichtshof by order of 26 March 2002, hereby rules:

The provisions of Article 10a of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, 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, and those of Annex IIa thereto must be interpreted as meaning that the compensatory supplement, within the meaning of the Gewerbliche Sozialversicherungsgesetz (Austrian Federal Law of 11 October 1978 on Social Insurance for self-employed persons engaged in trade and commerce), falls within the scope of that regulation and therefore constitutes a special non-contributory benefit within the meaning of Article 4(2a) of that regulation, so that the situation of a person who, after 1 June 1992, fulfils the conditions for the grant of that benefit is governed with effect from 1 January 1995, the date of the Republic of Austria's accession to the European Union, solely by the coordinating provisions laid down by Article 10a.

Cunha Rodrigues Puissochet Macken

Delivered in open court in Luxembourg on 29 April 2004.

R. Grass J.N. Cunha Rodrigues

Registrar President of the Fourth Chamber