JUDGMENT OF THE COURT (Sixth Chamber)
9 July 1987 *

In Case 377/85

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

Beverly Leila Burchell

and

Adjudication Officer

on the interpretation of Article 10 (1) (a) 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 their families moving within the Community (Official Journal, English Special Edition 1972 (I), p. 159), as amended,

THE COURT (Sixth Chamber),

composed of: C. Kakouris, President of Chamber, T. F. O'Higgins, T. Koopmans, O. Due and K. Bahlmann, Judges,

Advocate General: M. Darmon
Registrar: B. Pastor, Administrator

after considering the observations submitted on behalf of

Mrs Burchell, the appellant in the main proceedings, by E. Laing, Barrister,

the Adjudication Officer, the respondent in the main proceedings, by Kathleen F. Lee, Senior Legal Assistant, Department of Health and Social Security,

* Language of the Case: English.

the Netherlands Government, in the written procedure, by E. F. Jacobs, acting Secretary-General in the Ministry of Foreign Affairs, for the Minister for Foreign Affairs,

the Commission of the European Communities, by Julian Currall, a member of its Legal Department,

having regard to the Report for the Hearing and further to the hearing on 26 November 1986,

after hearing the Opinion of the Advocate General delivered at the sitting on 3 February 1987,

gives the following

Judgment

1 By decision of 25 November 1985, which was received at the Court on 28 November 1985, the Social Security Commissioner referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions concerning the interpretation of Article 10 (1) (a) 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 their families moving within the Community (Official Journal, English Special Edition 1972 (I), p. 159), as amended.

2 The questions were raised in the course of proceedings concerning the refusal of the Insurance Officer (now called the 'Adjudication Officer') to grant Mrs Burchell, the appellant in the main proceedings, child benefit for her two children.

3 Mrs Burchell, who is divorced and unemployed, lives in the United Kingdom with her two children, while her former husband resides in the Netherlands, where he is employed. In 1980, when she submitted an application to the British social security authorities, Mrs Burchell fulfilled all the conditions of eligibility for child benefit under British law. At the same time, her former husband received family

allowances in the Netherlands for the same two children, since under Netherlands law family benefits may be paid even if the members of the family are not resident in the Netherlands.

4 It appears from the documents before the Court that during the period in respect of which Mrs Burchell claimed benefits, neither British nor Netherlands law contained a rule against overlapping payments in such circumstances.

5 The Insurance Officer considered that since Mrs Burchell's former husband was entitled to Netherlands family benefit (child benefit) for the two children as if they were resident in the Netherlands, pursuant to Article 73 (1) of Regulation No 1408/71, Mrs Burchell's right to child benefit in the United Kingdom (which is not subject to conditions of insurance or employment) was suspended under the first sentence of Article 10 (1) (a) of Regulation No 574/72, as Mrs Burchell, not being engaged in any professional or trade activity, could not rely on the exception set out in the second sentence of Article 10 (1) (a).

6 Article 10 of Regulation No 574/72 provides as follows:

'(1) Entitlement to family 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:

(a) benefits are due in pursuance of Article 73 or 74 of the Regulation. If, however, the spouse of the employed person ... referred to in those Articles, exercises a professional or trade activity in the territory of the said Member State, the right to family benefits or family allowances due in pursuance of the said Articles shall be suspended; and only those family benefits or family allowances of the Member State in whose territory the member of the family is residing shall be paid, the cost to be borne by that Member State.'

7 Article 73 of Regulation No 1408/71 provides:

'(1) An employed person subject to the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State.'

8 Mrs Burchell appealed to the Social Security Commissioner. The Social Security Commissioner took the view that the dispute raised certain questions concerning the interpretation of Article 10 (1) (a) of Regulation No 574/72; he therefore stayed the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'(1) (a) Is a person who has been compulsorily insured for a number of contingencies covered by the branches of a social security scheme for (among others) employed persons, but who has ceased to pay contributions under such scheme either compulsorily or on an optional continued basis to be treated as an employed person for the purposes of Regulations 1408/71 and 574/72, if the contributions paid by such person while so compulsorily insured continue to be sufficient by themselves to entitle his or her estate in the event of his or her death to be paid a death grant under such scheme but are insufficient either alone or in conjunction with other matters to entitle him or her to any other contributory benefit under such scheme?

(b) If the answer to question (a) is negative, can the right of a person who is not either an employed person or a self-employed person for the purposes of Regulations 1408/71 and 574/72 to any benefit under such a scheme (not being a benefit derived through such person's status as a member of the family or survivor of an employed person or a self-employed person) be adversely affected by any of the provisions of either of the above Regulations?

(2) If the answer to either question 1 (a) or question 1 (b) is affirmative, is the provision for suspension contained in the first sentence of Article 10 (1) (a) of Regulation 574/72 to be interpreted as meaning that it applies whenever the institution of another Member State has granted family benefits to an employed earner in respect of the same child under the provisions of its domestic law without invoking Article 73 of Regulation 1408/71, if apart

from those provisions of its domestic law it should have awarded like benefits in pursuance of that Article?

(3) If the answer to question 2 is affirmative, is Article 10 (1) (a) of Regulation 574/72 incompatible with Article 51 of the EEC Treaty in so far as it deprives a person of a right conferred on him or her by a Member State independently of Community law or does so without compensatory advantage to that person?'

9 Reference is made to the Report for the Hearing for a more detailed description of the facts, the procedure and the observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

10 The Social Security Commissioner states in his decision that the purpose of the first question is to determine whether the first sentence of Article 10 (1) (a) of Regulation No 574/72 can be applied in the present case at all. The two parts of that question should therefore be read together as being directed to the question whether Article 10 (1) (a) of Regulation No 574/72 may, where family benefits or family allowances are due in respect of a child, apply to a person who, depending on his or her contributions to a social security scheme for employed persons, may or may not be treated as an employed person for the purposes of Regulations Nos. 1408/71 and 574/72.

11 It must be pointed out that in its judgment of 4 July 1985 in Case 104/84 *Kromhout* v *Raad van Arbeid* [1985] ECR 2205), the Court held that the first sentence of Article 10 (1) (a) of Regulation No 574/72 applies 'where a child in respect of whom family benefits or family allowances are due is, as a member of the family of one of the recipients of such benefits or allowances, a person covered by the Community legislation on social security for employed persons, without there being any need to ascertain whether the other recipient who is also entitled to family benefits or family allowances in respect of the same child is also covered by that legislation'.

12 Accordingly, the answer to the first question must be that the first sentence of Article 10 (1) (a) of Regulation No 574/72 applies where family benefits or family

allowances are due, in pursuance of Article 73 of Regulation No 1408/71, in respect of a child who, as a member of the family of one of the recipients of such benefits or allowances, is a person covered by the Community legislation on social security for employed persons, without there being any need to ascertain whether the other recipient who is also entitled to such benefits in respect of the same child is also covered by that legislation.

The second question

13 By the second question the Social Security Commissioner seeks in substance to determine whether the first sentence of Article 10 (1) (a) of Regulation No 574/72 applies where a family benefit is due pursuant to national law alone, without it being necessary to invoke Article 73 of Regulation No 1408/71, if the competent institution of a Member State would in any event have been required to award a like benefit in pursuance of the said Article 73.

14 It must be pointed out that it follows from the wording of the first sentence of Article 10 (1) (a) of Regulation No 574/72 that that provision is applicable only if benefits are due in pursuance of Article 73 or 74 of Regulation No 1408/71.

15 The question therefore arises whether a benefit may be considered to be due in pursuance of Article 73 where the benefit is in any event due under national law alone.

16 The only interpretation of Netherlands law advanced in these proceedings is a statement by the Sociale Verzekeringsbank in Amsterdam, in reply to a question from the British Department of Health and Social Security, to the effect that a person insured under the Algemene Kinderbijslagwet (General Law on Family Allowances) is entitled under the Netherlands legislation, irrespective of the application of the Community regulations, to family allowances in respect of children who are not living with the insured person but are residing in another Member State. Since that interpretation has not been contested in the course of these proceedings, in particular by the Netherlands Government, the Court may assume that the Netherlands allowances in question were in fact paid under national law alone.

17 As the Court stated in its judgment of 15 January 1986 in Case 41/84 *Pinna* v *Caisse d'allocations familiales de la Savoie*, [1986] ECR 1, Article 51 of the Treaty provides for the coordination, not the harmonization, of the legislation of the Member States. As a result, Article 51 leaves in being differences between the Member States' social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working in the Member States, are unaffected by Article 51 of the Treaty.

18 It must therefore be held that where, as in the present case, a family benefit is due under national legislation alone, irrespective of the place of residence of the children and without it being necessary to invoke Article 73 of Regulation No 1408/71, that benefit cannot be deemed to be due in pursuance of Article 73.

19 The answer to the second question must therefore be that the first sentence of Article 10 (1) (a) of Regulation No 574/72 must be interpreted as meaning that it does not apply where a benefit is due under national law alone and not in pursuance of Article 73 of Regulation No 1408/71.

20 In view of the answer to the second question, it is not necessary to reply to the third question.

Costs

21 The costs incurred by the Netherlands Government and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action pending before the Social Security Commissioner, the decision on costs is a matter for him.

On those grounds,

THE COURT (Sixth Chamber),

in answer to the questions referred to it by the Social Security Commissioner by a decision of 25 November 1985, hereby rules:

(1) The first sentence of Article 10 (1) (a) of Regulation No 574/72 applies where family benefits or family allowances are due, in pursuance of Article 73 of Regulation No 1408/71, in respect of a child who, as a member of the family of one of the recipients of such benefits or allowances, is a person covered by the Community legislation on social security for employed persons, without there being any need to ascertain whether the other recipient who is also entitled to such benefits in respect of the same child is also covered by that legislation.

(2) The first sentence of Article 10 (1) (a) of Regulation No 574/72 does not apply where a benefit is due under national law alone and not in pursuance of Article 73 of Regulation No 1408/71.

Kakouris O'Higgins

Koopmans Due Bahlmann

Delivered in open court in Luxembourg on 9 July 1987.

P. Heim
Registrar

C. Kakouris
President of the Sixth Chamber