JUDGMENT OF THE COURT (First chamber)
23 April 1986 *

In Case 153/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht [Federal Social Court] for a preliminary ruling in the proceedings pending before that court between

Antonio Ferraioli, Munich,

and

Deutsche Bundespost [German Federal Post Office]

on the interpretation of Article 76 of Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT (First Chamber)

composed of: R. Joliet, President, G. Bosco and T. F. O'Higgins, Judges,

Advocate General: M. Darmon
Registrar: H. A. Rühl

after considering the observations submitted on behalf of

Antonio Ferraioli, the plaintiff in the main proceedings, by J. Stahlberg, Rechtsanwalt, Munich,

the Government of the Federal Republic of Germany, by M. Seidel and E. Röder, acting as Agents,

* Language of the Case: German.

the Government of the Italian Republic, by Luigi Ferrari Bravo, Head of the Department for Contentious Diplomatic Affairs, acting as Agent, assisted by O. Fiumara, Avvocato dello Stato,

the Commission of the European Communities, in the written procedure by M. Beschel, a member of its Legal Department, and in the oral procedure by its Legal Adviser, P. Karpenstein,

after hearing the Opinion of the Advocate General delivered at the sitting on 23 January 1986,

gives the following

JUDGMENT

(The account of the fact and issues which is contained in the complete text of the judgment is not reproduced)

Decision

1 By an order of 25 April 1984, which was received at the Court on 19 June 1984, the Bundessozialgericht referred to the Court under Article 177 of the EEC Treaty three questions on the interpretation of Article 76 of Regulation No 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community.

2 Those questions were raised in proceedings seeking to annul a decision of the Deutsche Bundespost to stop payment of family allowances hitherto paid to the plaintiff in the main proceedings.

3 The plaintiff in the main proceedings, Antonio Ferraioli, an Italian national, has worked since 1961 for the Deutsche Bundespost, the defendant in the main proceedings. His wife and three children, Anna (born on 12 april 1962), Michele (born on 13 September 1963) and Salvatore (born on 14 January 1969) reside in Italy.

4 Until 1 May 1979 Mr Ferraioli received family allowances for his children under the Bundeskindergeldgesetz [Federal Law on Child Allowances]. When the defendant became aware that the plaintiff's wife had been employed in Italy since 1971 it withdrew the child allowances by a decision dated 22 May 1979 with effect from 1 May 1979. Subsequently the Deutsche Bundespost reversed its decision on the ground that entitlement to Italian family allowances ceased when the child reached the age of 16, but it granted German family allowances only in respect of Anna until 30 April 1980 and in respect of Michele from October 1979.

5 When an administrative complaint against the decision of the Deutsche Bundespost was unsuccessful, Mr Ferraioli brought the matter to the Sozialgericht München [Social Court, Munich] with a view to obtaining for his son Michele from 1 May to 30 September 1979 and for Salvatore from 1 May 1979 family allowances equal to the difference between the family allowances payable to his wife under the Italian legislation and the allowances under Article 10 of the Bundeskindergeldgesetz together with interest. The Sozialgericht upheld his claim in full and the decision was confirmed by the Bayerisches Landessozialgericht [Bavarian Regional Social Court]. The defendant thereupon appealed to the Bundessozialgericht.

6 The Bundessozialgericht considered that there was doubt as to the interpretation of Community law and stayed the proceedings pending a preliminary ruling from the Court of Justice on the following questions:

'(1) Does Article 76 of Regulation (EEC) No 1408/71 cover cases in which the family benefits or allowances arising from employment are not paid in the Member State in which the members of the family reside, according to the law of that State, only because the parent who is entitled has not applied for them?

(2) Are the family benefits payable to a parent in the State of employment under Article 73 of Regulation (EEC) No 1408/71 to be wholly suspended under Article 76 of that regulation or only to the extent to which family benefits on account of the professional or trade activity of the other parent are payable in the State of residence of the other members of the family?

(3) Is full suspension required under Article 76 of Regulation (EEC) No 1408/71 even where national law (in this case the Bundeskindergeldgesetz) provides that in the event of overlapping with foreign benefits of the same kind the parent remains entitled to the difference?'

7 In the course of the proceedings before the Court observations were submitted by Mr Ferraioli, the Government of the Federal Republic of Germany, the Italian Government and the Commission.

8 Article 73 of Regulation No 1408/71, to which the questions refer, provides that employed persons are entitled to the family benefits provided for by the legislation of the State of employment for members of the family residing in the territory of another Member State, as though they were residing in the State of employment.

9 Article 76 provides that entitlement is to be suspended if, by reason of the pursuit of a professional or trade activity, family benefits or family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing.

10 Mr Ferraioli maintains that where in the case covered by Article 76 of Regulation No 1408/71, the amount of family benefits or family allowances actually paid in the State of residence to the parent who is in employment there is less than the amount due to the other parent as a migrant worker in the State of employment under the national law supplemented by Community law for the same children and the same period, the migrant worker retains his entitlement to the family allowances in the State of employment and can recover from the competent institution of that State the difference between the allowances in the State of residence and the State of employment.

11 The Government of the Federal Republic of Germany observes that in principle family allowances ought to be the responsibility of the State in which the migrant worker is employed, but where the spouse pursues a professional or trade activity in another Member State so that the two States enjoy the professional or trade activity of the parents and receive taxes and social security contributions in respect thereof the State in which the children reside ought to pay the family allowances.

The German Government proposes that the second question should therefore be answered to the effect that entitlement to family allowances in the State of employment should be completely suspended.

12 The Italian Government maintains that if the wife makes no application she is not entitled to family allowances in Italy even if theoretically they might have been due to her; the institution responsible for paying allowances to the husband is not required to determine whether the allowances are payable to the wife under the national law of her State of residence but only to determine whether or not the allowances are in fact paid there. The question whether the spouse who is working in the other Member State may claim the difference between the allowances to which he is entitled in that State and the lesser allowances payable to the spouse who is working in the State of residence of the children must be answered in the affirmative whether or not the allowances are payable only under Community law or only under the national law of the State where the spouse is working.

13 The Commission states that Article 76 of Regulation No 1408/71 must be interpreted as meaning that entitlement to family benefits payable under Article 73 is to be suspended only if all the substantive and formal conditions for the payment of family allowances are in fact satisfied in the State of residence of the children, that is to say when, if necessary, an appropriate application for payment has been made. The Commission maintains that under Article 76 entitlement to family benefits or family allowances under Article 73 of Regulation No 1408/71 is to be suspended only up to the amount of the family benefits or family allowances payable as a result of the pursuit of a professional or trade activity under the provisions of the Member State in which the members of the family are residing.

Question 1

14 The Court has already considered the problem raised by the first question in its judgment of 13 November 1984 (Case 191/83 *Salzano* v *Bundesanstalt für Arbeit* [1984] ECR 3741) which concerned the case of a spouse of a migrant worker who had not made a claim for family allowances as required by the legislation of the country of residence. In that judgment the Court held that there was no suspension of the entitlement to family allowances payable in pursuance of Article 73 of Regulation No 1408/71 in the country of employment of one of the parents when the other parent resided with the children in another Member State and pursued there a professional or trade activity but did not receive family allowances

for the children on the ground that not all the conditions laid down by the legislation of that Member State for the actual receipt of such allowances had been satisfied. As is made clear in the grounds of the judgment, the relevant conditions are those both of substance and of form imposed by the legislation of the Member State of residence of the children and included precisely in that particular case the condition that a prior application had been made.

15 The reply to the first question must therefore be that there is no suspension under Article 76 of Regulation No 1408/71 of entitlement to family allowances payable in pursuance of Article 73 of that regulation in the Member State of employment of one of the parents when the other parent resides with the children in another Member State and pursues there a professional or trade activity but does not receive family allowances for the children on the ground that not all the conditions laid down by the legislation of that Member State for the receipt of such allowances are satisfied.

Question 2

16 As regards the second question it must be observed, as the Court has emphasized on several occasions, that regulations adopted by the Council in the field of social security for migrant workers must be interpreted in the light of the principle of freedom of movement for workers which is laid down in Article 51 of the EEC Treaty.

17 It is not possible, therefore, without disregarding that principle, to apply the provisions of Article 76 of Regulation No 1408/71 so as to deprive the worker of the benefit of the more favourable allowances by substituting the allowances payable in one Member State for the allowances payable in another Member State.

18 In line with that reasoning the Court held in its judgment of 12 June 1980 (Case 733/79 *Caisse de compensation des allocations familiales* v *Laterza* [1980] ECR 1915) that the principles underlying Regulation No 1408/71 require that if the amount of the benefits payable in the State of residence is less than that of the benefits payable in the other State, the worker retains the right to the higher amount and is entitled to a supplement to the benefits from the competent institution of the latter State equal to the difference between the two amounts.

19 For those reasons the answer to the second question is that Article 76 of Regulation No 1408/71 must be interpreted as meaning that entitlement to family allowances payable to one of the parents in the Member State of employment under Article 73 of the said regulation is suspended only up to the amount of allowances of the same kind actually paid in the Member State in whose territory the members of the family reside. Where the amount of family allowances actually received in the Member State of residence is less than the allowances provided for by the legislation of the other Member State the worker is entitled to claim from the competent institution of the latter Member State additional allowances equal to the difference between the two amounts.

Question 3

20 In view of the answer to the second question there is no need to answer the third question.

Costs

21 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Italian Republic and the Commission of the European Communities, which submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber),

in answer to the questions referred to it by the Bundessozialgericht by an order of 25 April 1984, hereby rules:

(1) There is no suspension under Article 76 of Regulation No 1408/71 of the entitlement to family allowances payable in pursuance of Article 73 of that regulation in the Member State of employment of one of the parents when the other parent resides with the children in another Member State and pursues

there a professional or trade activity but does not receive family allowances for the children on the ground that not all the conditions laid down by the legislation of that Member State for the receipt of such allowances are satisfied.

(2) Article 76 of Regulation No 1408/71 must be interpreted as meaning that entitlement to family allowances payable to one of the parents in the Member State of employment under Article 73 of the said regulation is suspended only up to the amount of allowances of the same kind actually paid in the Member State in whose territory the members of the family reside. Where the amount of family allowances actually received in the Member State of residence is less than the allowances provided for by the legislation of the other Member State, the worker is entitled to claim from the competent institution of the latter Member State additional allowances equal to the difference between the two amounts.

Joliet Bosco O'Higgins

Delivered in open court in Luxembourg on 23 April 1986.

P. Heim
Registrar

R. Joliet
President of the First Chamber