JUDGMENT OF THE COURT (Fifth Chamber)
7 May 1998 *

In Case C-113/96,

REFERENCE to the Court under Article 177 of the EC Treaty by the Bundessozialgericht, Germany, for a preliminary ruling in the proceedings pending before that court between

Manuela Gómez Rodríguez and Gregorio Gómez Rodríguez

and

Landesversicherungsanstalt Rheinprovinz

on the interpretation of Articles 6 and 78 of Regulation (EEC) No 1408/71 of the Council 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 (OJ 1983 L 230, p. 6), and of Articles 48 and 51 of the EC Treaty,

THE COURT (Fifth Chamber),

composed of: C. Gulmann (Rapporteur), President of the Chamber, J. C. Moitinho de Almeida, D. A. O. Edward, J.-P. Puissochet and P. Jann, Judges,

* Language of the case: German.

Advocate General: G. Cosmas,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

— Manuela Gómez Rodríguez and Gregorio Gómez Rodríguez, by Antonio Pérez Garrido, Head of Social Services in the Spanish Consulate-General, Düsseldorf,

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Sabine Maass, Regierungsrätin zur Anstellung in the same Ministry, acting as Agents,

— the Greek Government, by Fokion Georgakopoulos, Assistant Legal Adviser to the State Legal Service, and Ioanna Galani-Maragkoudaki, Special Assistant Legal Adviser in the Special European Communities Legal Department of the Ministry of Foreign Affairs, acting as Agents,

— the Spanish Government, by Gloria Calvo Díaz, Abogado del Estado, of the State Legal Service, acting as Agent,

— the Austrian Government, by Wolf Okresek, Ministerialrat in the Constitutional Affairs Service of the Federal Chancellor's Office, acting as Agent,

— the Swedish Government, by Lotty Nordling, Rättschef, acting as Agent,

— the Commission of the European Communities, by Peter Hillenkamp, Legal Adviser, and Maria Patakia, of its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Manuela Gómez Rodríguez and Gregorio Gómez Rodríguez, represented by Antonio Pérez Garrido; of the German Government, represented by Bernd Kloke, Oberregierungsrat in the Federal Ministry of Economic Affairs, acting as Agent; of the Greek Government, represented by Fokion Georgakopoulos; of the Spanish Government, represented by Santiago Ortiz Vaamonde, Abogado del Estado, acting as Agent; and of the Commission, represented by Peter Hillenkamp, at the hearing on 12 June 1997,

after hearing the Opinion of the Advocate General at the sitting on 25 September 1997,

gives the following

Judgment

1 By order of 8 February 1996, received at the Court on 5 April 1996, the Bundessozialgericht (Federal Social Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Articles 6 and 78 of Regulation (EEC) No 1408/71 of the Council 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 (OJ 1983 L 230, p. 6; hereinafter 'the Regulation'), and of Articles 48 and 51 of the EC Treaty.

2 Those questions were raised in proceedings brought by Manuela Gómez Rodríguez and Gregorio Gómez Rodríguez against the Landesversicherungsanstalt Rheinprovinz (Regional Insurance Office, Rheinprovinz; hereinafter 'the Landesversicherungsanstalt') concerning the grant of orphans' pensions.

3 Manuela Gómez Rodríguez and Gregorio Gómez Rodríguez live in Spain. Their father, a Spanish national, had been insured as an employed person for 56 months in Germany and 80 months in Spain. In February 1985 he died in Spain without having drawn a pension.

4 By decisions of 23 August 1988 the Landesversicherungsanstalt granted Manuela Gómez Rodríguez and Gregorio Gómez Rodríguez orphans' pensions for the period from 7 February to 31 December 1985 on the basis of the Convention between the Federal Republic of Germany and the Kingdom of Spain on social security concluded on 4 December 1973 (*Bundesgesetzblatt* II 1977, p. 687), as amended by a supplementary Convention of 17 December 1975 (*Bundesgesetzblatt* II 1977, p. 722). It also informed them that as from 1 January 1986, the date on which the Kingdom of Spain acceded to the European Communities, the Spanish pension insurance institution had sole competence to grant orphans' benefits, as provided for, in particular, by Article 78(2) of the Regulation.

5 Article 78(2) provides:

'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, the provisions of 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

(ii) in other cases in accordance with the legislation of the Member State to which the deceased had been subject for the longest period of time, provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), the right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State; if no right is acquired under that legislation, the conditions for the acquisition of such right under the legislations of the other Member States shall be examined in decreasing order of the length of periods of insurance or residence completed under the legislation of those Member States.

...'

6 The Spanish pension insurance institution thus granted orphans' pensions to the claimants from 1 January 1986 until they reached the age of 18, the age at which their entitlement to orphans' pension came to an end under Spanish law.

7 Manuela Gómez Rodríguez and Gregorio Gómez Rodríguez then applied to the Landesversicherungsanstalt for orphans' pensions under German law, which provides that persons attending an educational establishment may continue to receive those benefits up to the age of 25.

8 The Landesversicherungsanstalt refused that application on the ground that, once payment of the Spanish pensions had ceased, Article 78(2) of the Regulation did not confer a right to the orphans' pension provided for by German law; in particular, the conditions relating thereto had not been satisfied in the circumstances of the case as the deceased had not completed the required qualifying period of 60 months.

9 The objection lodged by the claimants against that decision was unsuccessful, as were their subsequent legal action and appeal.

10 By application of 7 November 1994 they appealed on a point of law to the Bundessozialgericht. They argued that it was not apparent from Article 78(2)(b) of the Regulation that, having regard to Article 79(1)(b), competence established on a certain date could never be called into question. The right to a German orphans' pension could be lost only in so far as Spanish law conferred the right to a pension. That was no longer so in the instant case because Spanish law provided for orphans' benefits only up to the age of 18.

11 In its order for reference, the Bundessozialgericht observes that the dispute is concerned with the question whether the Landesversicherungsanstalt is required to recommence paying to the claimants the orphans' pensions which it had paid to them before the accession of the Kingdom of Spain to the European Communities, having regard to the fact that the orphans' pensions which they received after that date from the Spanish pension insurance institution came to an end when each of them reached 18 years of age. The Bundessozialgericht accordingly decided to stay the proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is Article 78(2)(b) of Regulation (EEC) No 1408/71 to be interpreted as meaning that the provision contained therein for determining the legislation applicable for the grant of benefits is to apply permanently even if the right to orphans' pension initially arose in the Member State which is competent thereunder (in this case the State of residence) but has subsequently been lost by reason of the attainment of an age-limit, while in another Member State, whose legislation was also

applicable to the insured person, a right to orphans' pension would run beyond that date on application of Article 79 of Regulation (EEC) No 1408/71, or is there in such a case a change in the legislation applicable in accordance with Article 78(2)(b)(ii) of the regulation?

2. Does the expectation of continuing to receive orphans' pension already granted by a Member State under a convention concluded between two Member States and transposed into national law for a longer period (for example in the case of education or vocational training extending beyond the completion of the 18th year) than the orphans' pension which is to be granted pursuant to the legislation of another Member State, applicable under Article 78(2)(b) of Regulation (EEC) No 1408/71, constitute one of the social security advantages which orphans must not lose by virtue of the fact that the said convention has been rendered inapplicable by the entry into force of Regulation (EEC) No 1408/71?

3. If Question 2 is answered in the affirmative: Can orphans who were already entitled, before Regulation (EEC) No 1408/71 came into force, to orphans' pensions under the law of a Member State in pursuance of a social security convention concluded between two Member States again rely on that entitlement when a right to a benefit originally conferred by the legislation of another Member State which was applicable under Article 78(2)(b) of Regulation (EEC) No 1408/71 no longer exists?'

The first question

12 By its first question the national court essentially asks whether, on a proper construction of Article 78(2)(b) of the Regulation, Article 78(2)(b)(ii) becomes applicable in circumstances where a right to orphans' pension, which initially arose under Article 78(2)(b)(i) in the Member State in which the recipient resides, has

been lost by reason of the attainment of an age-limit, while in another Member State, whose legislation was also applicable to the insured person, a right to orphans' pension would run beyond that date on application of the rule on aggregation laid down in Article 79 of the Regulation.

13 According to the German and Austrian Governments, the intention of the Community legislature and the spirit and purpose of the relevant provisions of the Regulation support the view that competence cannot transfer after the State of residence has ceased paying the family allowances. They point out that the coordination achieved by the provision at issue rests on the principle that a single Member State, namely the State of residence, has competence to pay orphans' pensions. Otherwise the Member States which set a higher age-limit would always retain the competence to grant orphans a pension reflecting the deceased's entire career, irrespective of where the orphans reside and, moreover, of the number of periods of insurance completed in those Member States.

14 The appellants in the main proceedings and the Spanish and Greek Governments maintain, on the other hand, that Article 78(2)(b)(i) and (ii) entails the successive application of criteria for establishing the applicable legislation. Thus, the fact that entitlement to the Spanish benefits lapses when the recipients reach the age of 18 gives rise to a different set of circumstances requiring the application of different legislation, as provided for by Article 78(2)(b)(ii) of the Regulation.

15 First of all, the wording 'provided that ... a right to one of the benefits referred to in paragraph 1 is acquired', used in Article 78(2)(b)(i), means that the institution of the State of residence remains competent only until the benefit entitlement expires under that legislation. Secondly, a different interpretation would offend against the principle of the free movement of migrant workers and that of equal treatment, since the orphans would in any event be entitled to the benefits if they moved to Germany.

16 The Commission also takes the view that the competence of the German body is not precluded in this case. The Kingdom of Spain was initially the competent State; since entitlement cannot or can no longer be claimed there, competence passes to the State next in line, namely the Federal Republic of Germany.

17 The Spanish and Greek Governments and the Commission refer in support of their arguments to the case-law of the Court holding that entitlement to family benefits payable by the State in which the orphan resides does not result in the loss of entitlement to higher benefits previously acquired as against another Member State. In those circumstances a benefit supplement equal to the difference between the two amounts is payable by the latter Member State (see, in particular, Case 733/79 *CCAF* v *Laterza* [1980] ECR 1915, Case 807/79 *Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205 and Case C-251/89 *Athanasopoulos and Others* v *Bundesanstalt für Arbeit* [1991] ECR I-2797). The fact that, in the main proceedings, no supplement was paid in the past — whether because there turned out to be no difference in amount or because benefit was not claimed — cannot result in the entitlement being lost for good.

18 The Swedish Government likewise refers to the case-law of the Court on benefit supplements and states that, in circumstances such as those of this case, such a supplement must also be paid by the other Member State where the entitlement to benefit has been lost in the State of residence. That situation cannot be treated differently from the situation in which a supplement is paid because the rate of benefit in the other Member State is higher than the rate in the State of residence.

19 According to the observations of the appellants in the main proceedings, of the Greek, Spanish and Swedish Governments and of the Commission, entitlement to the German benefits could, in circumstances such as those of this case, be based either on the Court's case-law relating to benefit supplements or on

Article 78(2)(b)(ii), which becomes applicable because the orphan's pension entitlement acquired under Article 78(2)(b)(i) has come to an end in the State of residence.

20 In that regard, it should be noted that in Case C-59/95 *Bastos Moriana and Others* v *Bundesanstalt für Arbeit* [1997] ECR I-1071, the Court clarified its case-law on benefit supplements. It ruled on the question whether, under Articles 77 and 78 of the Regulation, the competent institution of a Member State must grant pensioners or orphans residing in another Member State a supplement of that kind even if entitlement to the pension or orphans' pension has not been acquired solely by virtue of periods of insurance completed in the first State.

21 The Court first recalled that the rules laid down in Articles 77 and 78 of the Regulation were designed to determine the Member State whose legislation governed the grant of the benefits in question, which were then granted, in principle, in accordance with the legislation of a single Member State. It followed from Articles 77(2)(b)(i) and 78(2)(b)(i) that where a pensioner or a deceased worker had been subject to the laws of more than one Member State, the benefits in question were to be paid in accordance with the laws of the State in whose territory the pensioner, or the orphan of the deceased worker, resided (*Bastos Moriana and Others*, paragraph 15).

22 Next, the Court stated that the rule relating to benefit supplements (see, in particular, the judgments in *Laterza* and *Gravina*) was based on the principle that the objective of Articles 48 to 51 of the Treaty would not be achieved if, as a consequence of the exercise of their right to freedom of movement, workers were to lose social security advantages guaranteed to them in any event by the laws of a single Member State (*Bastos Moriana and Others*, paragraph 17; see also Case 24/75 *Petroni* v *ONPTS* [1975] ECR 1149, paragraph 13).

23 The Court pointed out that to apply the provisions of Articles 77 and 78 of the Regulation specifying the Member State of residence as having sole competence

to grant the family benefits in question could result, however, in the persons concerned being deprived of their entitlement to benefit under the laws of another Member State alone. It was for that reason that, in its judgments in *Laterza* and *Gravina*, those provisions had been interpreted as meaning that the principle of a single State responsible for payment was subject, as regards family benefits, to an exception requiring the other Member State to grant a benefit supplement (see *Bastos Moriana and Others*, paragraph 18).

24 Finally, the Court concluded that, having regard to the reasoning underlying that exception, its scope could not be widened in such a way that a benefit supplement had also to be granted where the entitlement of the pensioner or orphan existed only by virtue of the application of the aggregation rules provided for by the Regulation. In that situation, the application of Articles 77 and 78 did not deprive the persons concerned of the benefits granted under the laws of another Member State alone (*Bastos Moriana and Others*, paragraph 19).

25 In the light of the above considerations, it must be held that in circumstances such as those of this case entitlement to the German benefits cannot be based on the case-law relating to benefit supplements. No German benefit entitlement was acquired in this case solely on the basis of periods of insurance completed in Germany, so that applying the Regulation, under which the State of residence is competent, does not deprive the persons concerned of entitlements acquired under the laws of another Member State alone.

26 Furthermore, the mere fact that the benefit covered by Article 78(2)(b)(i) comes to an end in the State of residence because an age-limit is reached, terminating entitlement to the benefit generally, does not render Article 78(2)(b)(ii) applicable.

27 The purpose of Article 78(2) of the Regulation is to determine the competent State for the grant of orphans' benefit, in particular where the deceased was subject to the legislation of several Member States. As a result of that determination, the legislation of a single Member State applies, in accordance with the principle to that effect set out in Article 13(1) of the Regulation.

28 As the Court has pointed out on a number of occasions, the Member States retain sole competence to determine the level and the duration of the benefits granted by them (see, *inter alia*, Case C-2/89 *Bestuur van de Sociale Verzekeringsbank* v *Kits van Heijningen* [1990] ECR I-1755, paragraph 19).

29 Accordingly, the fact that benefits ceased to be paid under the legislation of the Member State specified by Article 78(2)(b)(i) because the recipient no longer satisfied the age-limit conditions for their grant cannot result in another Member State becoming competent in respect of the same risk by recourse to another connecting factor contained in Article 78(2).

30 Moreover, if, as the German and Austrian Governments state, the interpretation proposed by the appellants in the main proceedings and the Spanish and Greek Governments were adopted, the Member States which have set the highest age-limit for entitlement to orphans' pension would always be competent with regard to the benefits, irrespective of where the orphans reside or of the duration of the periods of insurance completed by the insured person in the various Member States.

31 In addition, as the German Government has pointed out, it is inappropriate to apply Article 78(2)(b)(ii) in circumstances where the Member State of residence considers that the benefits no longer need to be paid, for example because the recipient, by reason of his age, is able to meet his own needs or because other benefits, such as training grants, take the place of family benefits.

32 It follows that, where entitlement to benefits which arose in the State of residence is lost because an age-limit has been reached, the competent institution of another Member State is not required to grant benefits to the persons concerned, unless they have acquired their entitlement there solely on the basis of the periods of insurance completed in that State.

33 The answer to the first question referred for a preliminary ruling must therefore be that, on a proper construction of Article 78(2)(b) of the Regulation, Article 78(2)(b)(ii) does not become applicable in circumstances where a right to orphans' pension, which initially arose under Article 78(2)(b)(i) in the Member State in which the recipient resides, has been lost by reason of the attainment of an age-limit, while in another Member State, whose legislation was also applicable to the insured person, a right to orphans' pension would run beyond that date on application of the rule on aggregation laid down in Article 79 of the Regulation.

The second and third questions

34 By its second and third questions, the national court essentially asks whether, in circumstances such as those in this case, Articles 48 and 51 of the Treaty preclude the loss of social security advantages for workers which would result from the inapplicability, following the entry into force of the Regulation, of a bilateral social security convention.

35 According to the appellants in the main proceedings and to the Greek, Spanish and Swedish Governments and the Commission, that question must be answered in the affirmative. They consider that the conditions laid down in Case C-227/89 *Rönfeldt* v *Bundesversicherungsanstalt für Angestellte* [1991] ECR I-323, as clarified in Case C-475/93 *Thévenon* v *Landesversicherungsanstalt Rheinland-Pfalz* [1995] ECR I-3813, are satisfied in this case.

36 The German and Austrian Governments, on the other hand, consider that those judgments cannot apply in circumstances such as those of this case; in particular, that solution would be impracticable, since the existing bilateral and multilateral conventions differ so widely that it would be absurd in administrative terms to require the institutions of the Member States to take into account, for each migrant worker, not only the rights which he holds under national and Community law but also those arising under those conventions.

37 It should be noted first that, under Article 6, the Regulation is, as regards persons and matters which it covers, and subject to certain exceptions, to replace any social security convention binding two or more Member States.

38 In Case 82/72 *Walder* v *Bestuur der Sociale Verzekeringsbank* [1973] ECR 599, on the interpretation of Articles 6 and 7 of the Regulation, the Court held (at paragraphs 6 and 7) that it was clear from those provisions that the replacement of provisions of social security conventions concluded between Member States by Community regulations was mandatory and did not allow of any exceptions save for the cases expressly referred to by the regulations, even where the social security conventions were more advantageous to the persons covered by them than those regulations.

39 However, the Court ruled in *Rönfeldt* that Articles 48(2) and 51 of the EC Treaty had to be interpreted as precluding the loss of social security advantages for the workers concerned which would result from the inapplicability, following the entry into force of the Regulation, of conventions operating between two or more Member States and incorporated in their national law.

40 In *Thévenon* the Court stated that the circumstances in *Rönfeldt* were specific in nature and not present in a case such as the one before it, where the insured person had not exercised his right to freedom of movement until after the entry into force of the Regulation, that is to say after the bilateral convention had already been replaced by the Regulation.

41 In the main proceedings, the appellants' father completed his periods of insurance in Spain and Germany before the accession of the Kingdom of Spain to the European Communities and the rule identified in *Rönfeldt*, as clarified in *Thévenon*, is therefore applicable in principle.

42 It follows that persons such as the appellants in the main proceedings cannot lose the social security advantage which they were guaranteed by the bilateral convention in question.

43 In that regard, the German Government points out that in this instance a comparison has already been made, under Article 118(1) of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 159), of the advantages resulting from, respectively, the bilateral convention and the Regulation, whose outcome was that it was more advantageous to apply the Regulation than the convention.

44 Article 118(1) of Regulation No 574/72 applies in circumstances where the Regulation enters into force after the risk materialises but before the benefit is set for the first time. In that case, the provision states that the pension claim is to give rise to a double award, both in accordance with the convention, for the period before the Regulation applied, and in accordance with the Regulation, for the period after its entry into force. It also provides that if the amount calculated under the convention is higher than that calculated under the Regulation, the person concerned is to continue to receive the amount calculated under the convention.

45 Since a comparison has already been made between the advantages resulting from the convention and those resulting from the Regulation, whose outcome was that the arrangements under the Regulation were more favourable for the appellants, the principle identified in *Rönfeldt* cannot be applied.

46 If it were otherwise, every migrant worker in the same position as the appellants could at any time ask for either the arrangements under the Regulation or those under the convention to be applied, depending on the most advantageous outcome for him at the time.

47 Such a comparison of the advantages, made on a regular basis whenever there is a change in the personal circumstances of the persons concerned, throughout the period during which the benefits are granted, would cause considerable administrative difficulties for the competent authorities of the Member States despite there being no basis for the comparison in the Regulation.

48 The answer to the second and third questions must therefore be that Articles 48 and 51 of the Treaty preclude the loss of social security advantages for workers which would result from the inapplicability, following the entry into force of the Regulation, of a bilateral social security convention. However, that principle cannot apply in so far as, when the benefits are set under the Regulation for the first time, a comparison has already been made of the advantages resulting from the Regulation and the convention, respectively, whose outcome was that it was more advantageous to apply the Regulation than the convention.

Costs

49 The costs incurred by the German, Greek, Spanish, Austrian and Swedish 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 (Fifth Chamber),

in answer to the questions referred to it by the Bundessozialgericht by order of 8 February 1996, hereby rules:

1. **On a proper construction of Article 78(2)(b) of Regulation (EEC) No 1408/71 of the Council 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, Article 78(2)(b)(ii) does not become applicable in circumstances where a right to orphans' pension, which initially arose under Article 78(2)(b)(i) in the Member State in which the recipient resides, has been lost by reason of the attainment of an age-limit, while in another Member State, whose legislation was also applicable to the insured person, a right to orphans' pension would run beyond that date on application of the rule on aggregation laid down in Article 79 of the regulation.

2. Articles 48 and 51 of the EC Treaty preclude the loss of social security advantages for workers which would result from the inapplicability, following the entry into force of Regulation No 1408/71, of a bilateral social security convention. However, that principle cannot apply in so far as, when the benefits are set under the regulation for the first time, a comparison has already been made of the advantages resulting from the regulation and the convention, respectively, whose outcome was that it was more advantageous to apply the regulation than the convention.

Gulmann Moitinho de Almeida Edward

Puissochet Jann

Delivered in open court in Luxembourg on 7 May 1998.

R. Grass C. Gulmann

Registrar President of the Fifth Chamber