

JUDGMENT OF THE COURT
27 February 1997 *

In Case C-59/95,

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

Francisco Bastos Moriana,

Cristóbal Aguilera Reyes,

Cristóbal Gordo Valle,

Fernando Romero Ramos,

Rosa Moscato,

Ana Muñoz Abato

and

* Language of the case: German.

Bundesanstalt für Arbeit

on the interpretation of Articles 77(2)(b), 78(2)(b) and 79(1) 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),

THE COURT,

composed of: G. C. Rodríguez Iglesias, President, J. C. Moitinho de Almeida, J. L. Murray and L. Sevón (Presidents of Chambers), P. J. G. Kapteyn, C. Gulmann (Rapporteur), D. A. O. Edward, J.-P. Puissechet, G. Hirsch, P. Jann and M. Wathelet, Judges,

Advocate General: N. Fennelly,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— Francisco Bastos Moriana, Cristóbal Aguilera Reyes, Cristóbal Gordo Valle, Fernando Romero Ramos and Ana Muñoz Abato, 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 Gereon Thiele, Assessor in that Ministry, acting as Agents,

- the Spanish Government, by Alberto Navarro González, Director General for Coordination in Community Legal and Institutional Matters, and Miguel Bravo-Ferrer Delgado, Abogado del Estado, of the State Legal Service, acting as Agents,

- the Commission of the European Communities, by Maria Patakia, of its Legal Service, and Horstpeter Kreppel, a national civil servant on secondment to that Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Francisco Bastos Moriana, Cristóbal Aguilera Reyes, Cristóbal Gordo Valle, Fernando Romero Ramos and Ana Muñoz Abato, 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 Spanish Government, represented by Luis Pérez de Ayala Becerril, Abogado del Estado, of the State Legal Service, acting as Agent, and the Commission, represented by Jürgen Grunwald, Legal Adviser, acting as Agent, at the hearing on 10 September 1996,

after hearing the Opinion of the Advocate General at the sitting on 24 October 1996,

gives the following

Judgment

- 1 By order of 16 January 1995, received at the Court on 7 March 1995, the Sozialgericht Nürnberg (Social Court, Nuremberg) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty questions on the interpretation of Articles 77(2)(b), 78(2)(b) and 79(1) 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').
- 2 Those questions were raised in proceedings between Francisco Bastos Moriana, Cristóbal Aguilera Reyes, Cristóbal Gordo Valle, Fernando Romero Ramos, Rosa Moscato and Ana Muñoz Abato ('the plaintiffs') and the Bundesanstalt für Arbeit (Federal Labour Office), the German institution responsible for the application of the Bundeskindergeldgesetz (Federal Law on Child Allowances), concerning entitlement to supplementary family benefits.
- 3 The first four plaintiffs, who are Spanish nationals, worked for various periods in Germany, where they paid compulsory contributions to the workers' pension scheme. Several years after returning to Spain, they became unable to work as a result of invalidity. They were then recognized as entitled, pursuant to Article 45 of the regulation, to a German invalidity pension, following aggregation of the periods of insurance completed in Germany and in other Member States.

- 4 Of the last two plaintiffs, one is an Italian national residing in Italy and the other is a Spanish national residing in Spain. They are the widows of Italian and Spanish nationals respectively who worked in Germany, where they paid compulsory contributions to the workers' pension scheme, and who then returned to their own countries. Their widows receive German widow's pensions in accordance with Article 45 of the regulation, after aggregation of the periods of insurance completed in Germany and in other Member States. Their children, by contrast, have not received German orphan's pensions.
- 5 The plaintiffs applied to the Bundesanstalt für Arbeit for German dependent child allowances in respect of their children, inasmuch as those allowances are granted for longer periods, or in a higher sum, than those granted by their State of residence. The plaintiffs are therefore seeking an additional amount ('benefit supplement') equal to the difference between the German allowance and that of their State of residence.
- 6 The plaintiffs maintain that their claims are justified under Articles 77 and 78 of the regulation, as interpreted by the Court in its judgments in Case 733/79 *CCAF v Laterza* [1980] ECR 1915, Case 807/79 *Gravina v Landesversicherungsanstalt Schwaben* [1980] ECR 2205 and, latterly, Case C-251/89 *Athanasopoulos and Others v Bundesanstalt für Arbeit* [1991] ECR I-2797. It is, they claim, apparent from those decisions that benefit supplements are payable to pensioners even where their pension entitlement has been acquired only under the provisions of the regulation which relate to the aggregation of periods completed in different Member States.
- 7 The Bundesanstalt für Arbeit rejected those claims. It considered that the Court's case-law relied on did not apply to their cases, since payment of a benefit supplement was due under Articles 77 and 78 of the regulation only if the pension

entitlement, or the orphan's entitlement, was acquired solely by virtue of insurance periods completed in Germany. That condition was not fulfilled by the plaintiffs.

- 8 According to Article 77(2)(b)(i) of the regulation, benefits for dependent children of pensioners are to be granted 'to a pensioner who draws pensions under the legislation of more than one Member State:

- (i) in accordance with the legislation of whichever of those States he resides in provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), a right to one of the benefits ... is acquired under the legislation of that State'.

- 9 Article 78(2)(b)(i) of the regulation provides, similarly, that orphans' benefits, including family allowances, are to be granted '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 ... is acquired under the legislation of that State'.

10 Article 79(1) of Regulation No 1408/71 provides:

‘Benefits, within the meaning of Articles 77 and 78, shall be provided in accordance with the legislation determined by applying the provisions of those articles by the institution responsible for administering such legislation and at its expense as if the pensioner or the deceased had been subject only to the legislation of the competent State.

However:

(a) if that legislation provides that the acquisition, retention or recovery of the right to benefits shall be dependent on the length of periods of insurance, employment, self-employment or residence such length shall be determined taking into account, where appropriate, the provisions of Article 45 or, as the case may be, Article 72.

...’

11 The Sozialgericht Nürnberg, before whom the actions contesting the decisions of the Bundesanstalt für Arbeit were brought, decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

‘1) Must Article 77(2)(b) in conjunction with Article 79(1) of Regulation (EEC) No 1408/71 be interpreted as meaning that, for dependent children of pensioners who have acquired entitlement to a pension in a Member State not only on the basis of the legislation of that Member State but also on the basis of the coordinating provisions of European social law, the Member State in which the pensioners do not reside must pay supplementary family allowances

equal to the difference between the amount of the benefits provided for in that Member State and the benefits paid or provided for by the State of residence?

- 2) Must Article 78(2)(b) in conjunction with Article 79(1) of Regulation (EEC) No 1408/71 be interpreted as meaning that, for orphans of a deceased employed or self-employed person who was subject to the legislation of several Member States, if entitlement to an orphan's pension in a Member State whose law applied does not exist solely on the basis of the legislation of that Member State or on the basis of the coordinating provisions of European social law, the Member State in which the orphans do not reside must pay supplementary family allowances equal to the difference between the amount of the benefits provided for in that Member State and the benefits paid or provided for by the State of residence?

- 3) If the replies to Questions 1 and 2 are in the affirmative and there is entitlement to family allowances, must the amount of the supplement be reduced according to the ratio between the periods of insurance completed in the Member State and the periods of insurance of the same kind completed in the State of residence (or another Member State)?

- 4) Is entitlement to supplementary allowances precluded by the fact that a pension benefit granted under a social insurance agreement has not been converted in accordance with Article 94(5) of Regulation (EEC) No 1408/71?

¹² By order of 9 November 1995, received at the Court on 16 November 1995, the Sozialgericht Nürnberg withdrew the fourth question on the ground that it had been resolved in favour of the workers in question.

The first and second questions

- 13 By its first two questions, the national court asks essentially whether Articles 77(2)(b)(i) and 78(2)(b)(i) of the regulation are to be construed as meaning that the competent institution of a Member State must grant pensioners or orphans residing in another Member State supplementary family benefits where the amount of the family benefits provided by the Member State of residence is lower than that of the benefits provided under the laws of the first Member State, even if entitlement to the pension or orphan's pension has not been acquired solely by virtue of insurance periods completed in that State.
- 14 According to the plaintiffs, the Spanish Government and the Commission, the principle of freedom of movement for workers, enshrined in Articles 48 and 51 of the EC Treaty, requires that question to be answered in the affirmative, with the result that supplementary family benefits are also to be paid where entitlement to a German pension or orphan's pension is acquired solely pursuant to the provisions of the regulation concerning aggregation of the periods completed in different Member States. Otherwise, a worker could be precluded from establishing himself in another Member State by fear of losing the family allowances to which he would be entitled if he continued to reside in the same State. They thus observe that it is not the protection of rights acquired under the laws of a single Member State which determines the interpretation of Articles 77 and 78 of the regulation. They refer in that regard to the case-law of the Court, according to which the objective pursued by Articles 48 to 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose social security advantages (see, in particular, Case C-186/90 *Durighello v INPS* [1991] ECR I-5773, paragraphs 15 and 16, and *Athanasopoulos*, cited above, paragraphs 35 and 37).
- 15 It should be recalled in that regard that the rules laid down in Articles 77 and 78 are designed to determine the Member State whose legislation governs the grant of benefits for dependent children of pensioners and for orphans, which are then

granted, in principle, in accordance with the legislation of that Member State alone. It follows from Articles 77(2)(b)(i) and 78(2)(b)(i) that where a pensioner or a deceased worker has been subject to the laws of more than one Member State, the benefits 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.

- 16 However, the Court has stated that those provisions must be interpreted as meaning that entitlement to family benefits from the State in whose territory a recipient of a retirement or invalidity pension or an orphan resides does not take away the right to higher benefits awarded previously by another Member State. In those circumstances, a supplement equal to the difference between the two amounts is payable by the latter Member State (see, in particular, the judgments in *Laterza* and *Gravina*, cited above).
- 17 That interpretation of Articles 77 and 78 of the regulation is based on the principle, frequently recalled by the Court, 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 (see, in particular, Case 24/75 *Petroni v ONPTS* [1975] ECR 1149, paragraph 13). It follows that the provisions of the regulation cannot apply if their effect is to diminish the benefits which the person concerned may claim by virtue of the laws of a single Member State on the basis solely of the insurance periods completed under those laws (*Petroni*, cited above, paragraph 16).
- 18 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 may 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*, the Court interpreted those provisions as meaning that the principle of a single State responsible for payment is subject, as regards family benefits, to an exception requiring the other Member State to grant a supplement.

- 19 Having regard to the reasoning underlying that exception, its scope cannot be widened in such a way that a supplement must also be granted where the entitlement of the pensioner or orphan exists 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 does not deprive the persons concerned of the benefits granted under the laws of another Member State alone.
- 20 Such an interpretation is precluded neither by the judgment in *Athanasopoulos* nor by that in *Durighello*.
- 21 In the first of those judgments, the Court was called upon to clarify its case-law, cited above, relating to benefit supplements. In particular, the questions at issue were whether such supplements were to be paid only if the pension entitlement in the Member State from whose institution the supplement was claimed had been acquired before the person concerned changed his residence, and whether the pensioner's dependent children were born before the transfer of residence. The Court's reasoning, which prompted it to answer those two questions in the nega-

tive, does not affect the substance of its case-law on benefit supplements, according to which entitlement to such a supplement presupposes entitlement to a pension, or to an orphan's pension, acquired solely under national legislation.

- 22 The same applies as regards the judgment in *Durighello*, which concerned a situation different from that in the present case, particularly inasmuch as it raised questions relating to the effect of Articles 77 to 79 on the application of legislation in the Member State where the migrant worker resided. In that judgment, the migrant worker receiving the pension was refused, in his country of residence, the family allowances for a dependent spouse for which provision was made for pensioners by the national legislation, on the ground that he had acquired his entitlement to that pension pursuant to the provisions of the regulation. In those circumstances, the Court was able to restrict its answer to the question referred by ruling that Articles 77 to 79 of the regulation did not preclude legislation such as that in issue from applying in the case of a person in receipt of a pension pursuant to the regulation.

- 23 Having regard to those considerations, the answer to the first two questions must be that Articles 77(2)(b)(i) and 78(2)(b)(i) of the regulation must be interpreted as meaning that the competent institution of a Member State is not bound to grant supplementary family benefits to pensioners or orphans residing in another Member State where the amount of the family benefits paid by the Member State of residence is lower than that of the benefits provided for by the laws of the first Member State if entitlement to the pension, or to the orphan's pension, has not been acquired solely by virtue of insurance periods completed in that State.

Question 3

- 24 In view of the answer given to the first two questions, there is no need to give a ruling on the third question.

Costs

- 25 The costs incurred by the German and Spanish Governments and the Commission of the European Communities, 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,

in answer to the questions referred to it by the Sozialgericht Nürnberg by order of 16 January 1995, hereby rules:

Articles 77(2)(b)(i) and 78(2)(b)(i) 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, must be interpreted as meaning that the competent

institution of a Member State is not bound to grant supplementary family benefits to pensioners or orphans residing in another Member State where the amount of the family benefits paid by the Member State of residence is lower than that of the benefits provided for by the laws of the first Member State if entitlement to the pension, or to the orphan's pension, has not been acquired solely by virtue of insurance periods completed in that State.

Rodríguez Iglesias

Moitinho de Almeida

Murray

Sevón

Kapteyn

Gulmann

Edward

Puissochet

Hirsch

Jann

Wathelet

Delivered in open court in Luxembourg on 27 February 1997.

R. Grass

G. C. Rodríguez Iglesias

Registrar

President