JUDGMENT OF THE COURT (Fifth Chamber)
10 October 1996 *

In Joined Cases C-245/94 and C-312/94,

REFERENCE to the Court under Article 177 of the EC Treaty by the Landessozialgericht Nordrhein-Westfalen (Germany) for a preliminary ruling in the proceedings pending before that court between

Ingrid Hoever,

Iris Zachow

and

Land Nordrhein-Westfalen

on the interpretation of Articles 4(1)(h) and 73 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 (OJ, English Special Edition 1971 (II), p. 416), in the version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1), of Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24) and of Article 7(2) of Regulation (EEC) No 1612/68 of the

* Language of the case: German.

Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475),

THE COURT (Fifth Chamber),

composed of: J. C. Moitinho de Almeida, President of the Chamber, L. Sevón, D. A. O. Edward (Rapporteur), P. Jann and M. Wathelet, Judges,

Advocate General: F. G. Jacobs,
Registrar: D. Louterman-Hubeau, Principal Administrator,

after considering the written observations submitted on behalf of:

— Iris Zachow (in Case C-312/94), by Horst Herbartz, Rechtsanwalt, Herzogenrath,

— the German Government, in Case C-245/94, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent, and, in Case C-312/94, by Ernst Röder and Gereon Thiele, Assessor in the Federal Ministry of Economic Affairs, acting as Agents,

— the Spanish Government (in Case C-312/94), by Alberto José Navarro González, Director General for Coordination in Community Legal and Institutional Matters, and Gloria Calvo Díaz, Abogado del Estado, acting as Agents,

— the French Government, in Case C-245/94, by Edwige Belliard, Assistant Director in the Legal Affairs Directorate of the Ministry of Foreign Affairs, and Claude Chavance, Principal Attaché for central administration in the same directorate, acting as Agents, and, in Case C-312/94, by Edwige Belliard and Anne de Bourgoing, Chargé de Mission in the Legal Affairs Directorate of the Ministry of Foreign Affairs, acting as Agents,

— the Luxembourg Government (in Cases C-245/94 and C-312/94), by Claude Ewen, Social Security Inspector, 1st Class, in the Ministry of Social Security, acting as Agent,

— the Commission of the European Communities (in Cases C-245/94 and C-312/94), 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: Ingrid Hoever, represented by F. B. Heinzel, Rechtsanwalt, Kleve; Iris Zachow, represented by Horst Herbartz; the German Government, represented by Bernd Kloke, Oberregierungsrat in the Federal Ministry for Economic Affairs, acting as Agent; the Spanish Government, represented by Gloria Calvo Díaz; the French Government, represented by Claude Chavance; the Luxembourg Government, represented by Claude Ewen; the United Kingdom Government, represented by Lindsey Nicoll, of the Treasury Solicitor's Department, acting as Agent, and by Philippa Watson, Barrister; and the Commission, represented by Klaus-Dieter Borchardt, of its Legal Service, acting as Agent, at the hearing on 14 March 1996,

after hearing the Opinion of the Advocate General at the sitting on 2 May 1996,

gives the following

Judgment

1 By orders of 17 June 1994 (Case C-245/94) and 19 August 1994 (Case C-312/94), received at the Court on 12 September and 28 November 1994 respectively, the Landessozialgericht Nordrhein-Westfalen (North Rhine-Westphalia Higher Social Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty three questions on the interpretation of Articles 4(1)(h) and 73 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 (OJ, English Special Edition 1971 (II), p. 416), in the version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1, hereinafter 'Regulation No 1408/71'), of Article 4(1) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ 1979 L 6, p. 24) and of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).

2 The three questions were raised in proceedings brought by Mrs Hoever (Case C-245/94) and Mrs Zachow (Case C-312/94) against the Land Nordrhein-Westfalen concerning payment of child-raising allowance (*Erziehungsgeld*).

German child-raising allowance is a non-contributory benefit forming part of a set of family-policy measures and is granted pursuant to the Bundeserziehungsgeldgesetz (Federal Law on the grant of child-raising allowance and child-raising leave, BGBl. I, p. 2154, hereinafter 'the BErzGG').

4 Paragraph 1(1) of the BErzGG, in the version thereof dated 25 July 1989 (BGBl. I, p. 1550), as amended by the Law of 17 December 1990 (BGBl. I, p. 2823), provides that any person who (1) is permanently or ordinarily resident in the territory to which the Law applies, (2) has a dependent child in his household, (3) looks after and brings up that child, and (4) has no, or no full-time, employment, is entitled to child-raising allowance.

5 According to Paragraph 1(4) of the BErzGG, a national of a Member State of the European Community who does not reside in Germany but who is employed within the scope of that Law and who fulfils conditions 2 to 4 of Paragraph 1(1) is also entitled to child-raising allowance.

6 A person is employed, within the meaning of Paragraph 1(4) of the BErzGG, if, in particular, he or she works for not less than 15 hours a week, that being the maximum period of minor employment provided for by Paragraph 8 of Book IV of the Sozialgesetzbuch (Code of Social Law, BGBl. I, p. 1450).

7 Both Mrs Hoever and Mrs Zachow, like their husbands, are German nationals and live at Kerkrade in the Netherlands. Since June 1990 Mrs Hoever has been working for 10 hours a week in Aachen, in Germany. When her son was born, she took 18 months' child-raising leave. Mrs Zachow has not been employed since 1985. Mr Hoever and Mr Zachow both have full-time employment in Germany.

8 On 30 May 1991 and 28 December 1987 respectively Mrs Hoever and Mrs Zachow applied for child-raising allowance for their sons, born in 1991 and 1987 respectively. The Land Nordrhein-Westfalen rejected those applications, and also the administrative appeals lodged by them, on the grounds that, by reason of her limited number of working hours, Mrs Hoever was not an employed person and that Mrs Zachow resided and had her habitual place of abode in the Netherlands. They brought proceedings against those decisions before the Sozialgericht (Social Court) Münster. That court likewise dismissed their claims, on the ground, in particular,

that they were not employed persons within the meaning of Article 73 of Regulation No 1408/71.

9 They then appealed against those judgments to the Landessozialgericht Nordrhein-Westfalen, maintaining in particular that the benefits provided for by the BErzGG constitute 'family benefits' within the meaning of Article 4(1)(h) of Regulation No 1408/71 and that, according to Article 73 of that regulation, child-raising allowance is to be paid to the spouse, residing abroad, of a person employed in Germany.

10 According to Article 4(1)(h) of Regulation No 1408/71, that regulation applies 'to all legislation concerning (...) family benefits'.

11 Article 1(u)(i) of that regulation defines 'family benefits' as 'all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h), excluding the special childbirth allowances mentioned in Annex II'.

12 Article 73 of Regulation No 1408/71 provides:

'An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.'

13 The national court considered that determination of the proceedings depended on the interpretation to be given to the Community rules. It therefore stayed proceedings and, in Case C-245/94, referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is child-raising allowance within the meaning of Paragraph 1 et seq. of the Law on the grant of child-raising allowance and child-raising leave, in the version contained in the public notification of 25 July 1989 (BGBl. I, p. 1550), and of the Law of 17 December 1990 (BGBl. I, p. 2823) — hereinafter "the BErzGG" — a family benefit within the meaning of Article 4(1)(h) of Regulation (EEC) No 1408/71?

2. If so:

(a) May the spouse of a person employed in the Federal Republic of Germany, whose family lives in another Member State, claim payment of child-raising allowance on the basis of Article 73 of Regulation No 1408/71?

(b) Does Paragraph 1(4) of the BErzGG constitute discrimination on grounds of sex contrary to Article 4(1) of Directive 79/7/EEC in so far as it provides that nationals of a Member State employed in the Federal Republic of Germany can claim child-raising allowance thereunder only if their employment entails a significant number of working hours?

3. If not:

(a) Is child-raising allowance a social advantage within the meaning of Article 7(2) of Regulation (EEC) No 1612/68?

(b) If so, is Article 7(2) of Regulation (EEC) No 1612/68 applicable if the worker residing in another Member State is a national of the State where he is employed?

(c) If so, does Article 7(2) of Regulation (EEC) No 1612/68 confer upon the worker's spouse entitlement to payment of child-raising allowance if the family resides in a Member State other than the State of employment?'

14 Similarly, in Case C-312/94, the national court stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling:

'1. Is child-raising allowance within the meaning of Paragraph 1 et seq. of the Law on the grant of child-raising allowance and child-raising leave (the Bundeserziehungsgeldgesetz — "BErzGG"), in the version contained in the public notification of 6 December 1985, BGBl. I, p. 2154, as amended by Paragraph 6 of the Law amending provisions concerning statutory pensions insurance and other provisions of social law — the 7th amending Law on pensions insurance of 19 December 1986, BGBl. I, pp. 2586, 2589 —, and of the Law of 17 December 1990 (BGBl. I, p. 2823) a family benefit within the meaning of Article 4(1)(h) of Regulation (EEC) No 1408/71?

2. If so: may the spouse of a person employed in the Federal Republic of Germany, whose family lives in another Member State, claim payment of child-raising allowance on the basis of Article 73 of Regulation No 1408/71?

3. If not:

(a) Is child-raising allowance a social advantage within the meaning of Article 7(2) of Regulation (EEC) No 1612/68?

(b) If so, is Article 7(2) of Regulation (EEC) No 1612/68 applicable if the worker residing in another Member State is a national of the State where he is employed?

(c) If so, does Article 7(2) of Regulation (EEC) No 1612/68 confer upon the worker's spouse entitlement to payment of child-raising allowance if the family resides in a Member State other than the State of employment?'

15 By order of the President of the Court of 13 September 1995 the two cases were joined, in accordance with Article 43 of the Rules of Procedure, for the purposes of the oral procedure and judgment.

Question 1 in Cases C-245/94 and C-312/94

16 By this question, concerning the substantive scope of Regulation No 1408/71, the national court essentially seeks to ascertain whether a child-raising allowance such as that provided for by the BErzGG must be treated as a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71.

17 The Court has repeatedly held that the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of each particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation (see, in particular, the judgment in Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 14).

18 In that regard, it has, on a number of occasions, stressed that a benefit is to be regarded as a social security benefit if it is granted to recipients without any individual and discretionary assessment of personal needs on the basis of a legally defined position and if it concerns one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (judgment in *Hughes*, cited above, paragraph 15).

19 A benefit such as the child-raising allowance at issue in the present cases meets those conditions.

20 As far as the first condition is concerned, the provisions relating to the grant of German child-raising allowance confer a legally defined right, and the allowance is granted automatically to persons who fulfil certain objective criteria, without any individual and discretionary assessment of personal needs.

21 The point made by the Luxembourg Government that the child-raising allowance is a flat-rate sum which does not vary according to the number or age of the children does not detract from the objective nature of the criteria for granting the benefit. In any event, the documents before the Court show that the amount of the benefit does in fact vary according to the financial situation of the family and, indirectly, depending on the number of children.

22 As regards the second condition, the German Government maintains that the child-raising allowance does not have the same purpose as a 'family benefit' within the meaning of Article 1(u)(i) of Regulation No 1408/71 since the child-raising allowance is intended, by conferring a personal right, to remunerate the particular parent who both takes on the task of raising a child and personally fulfils the conditions for grant of the allowance.

23 That argument cannot be accepted. The aim of a benefit such as that at issue is to meet family expenses within the meaning of Article 1(u)(i) of Regulation No 1408/71.

24 First, child-raising allowance is paid only where the family of the person concerned comprises one or more children. Furthermore, its amount varies partly according to the age and number of the children, and also according to the parents' income.

25 Second, as the German Government has pointed out in its written observations, child-raising allowance is intended to enable one of the parents to devote himself or herself to the raising of a young child. As the referring court has stressed, the allowance is aimed more particularly at remunerating the service of bringing up a child, meeting other costs of caring for and bringing up a child and, as the case may be, mitigating the financial disadvantages entailed in giving up income from full-time employment.

26 Third, the link between child-raising allowance and child-raising leave, to which the German Government draws attention, cannot remove the allowance from the scope of Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71 since it must be granted to the recipient, whether or not he or she is an employed person.

27 Consequently, the answer to Question 1 in Cases C-245/94 and C-312/94 must be that a benefit such as the child-raising allowance provided for by the BErzGG, which is automatically granted to persons fulfilling certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, must be treated as a family benefit within the meaning of Article 4(1)(h) of Regulation No 1408/71.

Question 2(a) in Case C-245/94 and Question 2 in Case C-312/94

28 By Question 2(a) in Case C-245/94 and Question 2 in Case C-312/94, which concern the scope *ratione personae* of Regulation No 1408/71, the national court seeks to ascertain whether, where an employed person is subject to the legislation of a Member State and lives with his or her family in another Member State, that person's spouse is entitled, under Article 73 of Regulation No 1408/71, to receive a benefit such as child-raising allowance in the State of employment.

29 First of all, neither Mrs Hoever nor Mrs Zachow disputes that they are not persons covered by Regulation No 1408/71, since they are not subject to social insurance within the meaning of Part I. C of Annex I to that regulation (relating to Germany), which defines the conditions to be fulfilled in order to qualify as an employed person for the purposes of the application of Article 73 in Germany. On the other hand, Mr Hoever and Mr Zachow do fulfil those criteria. They are therefore covered by Regulation No 1408/71 and may consequently be regarded as employed persons within the meaning of Article 73 of that regulation.

30 Furthermore, in cases such as these, the plaintiffs' entitlement to child-raising allowance does not depend on their status as members of a worker's family. In order to be eligible for the allowance, they must personally fulfil the conditions laid down in Paragraph 1(4) of the BErzGG.

31 The German, Spanish and French Governments and the Commission have referred in this regard to the line of authority beginning with the judgment in Case 40/76 *Kermaschek* [1976] ECR 1669 (paragraph 7), according to which the members of a worker's family can claim, under Regulation No 1408/71, only derived rights acquired through their status as a member of the family of a worker, that is to say,

of a person who can claim the rights to benefits covered by the regulation in his own right (for application of that case-law to Article 73 of Regulation No 1408/71, see the judgment in *Hughes*, cited above).

32 However, in the judgment of 30 April 1996 in Case C-308/93 *Cabanis-Issarte* ([1996] ECR I-2097, paragraph 34), the scope of the rule in *Kermaschek* was limited to cases in which a member of a worker's family relies on provisions of Regulation No 1408/71 which are applicable solely to workers and not to members of their families, such as Articles 67 to 71, relating to unemployment benefits. That is not the case with Article 73 of the regulation, the precise purpose of which is to guarantee members of the family residing in a Member State other than the competent State the grant of the family benefits provided for by the applicable legislation.

33 It follows that the distinction between personal rights and derived rights does not in principle apply to family benefits.

34 Next, it must be remembered that Article 73 of Regulation No 1408/71 is intended in particular to prevent Member States from making entitlement to and the amount of family benefits dependent on residence of the members of the worker's family in the Member State providing the benefits, so that Community workers are not deterred from exercising their right to freedom of movement (see Case C-321/93 *Imbernon Martínez* [1995] ECR I-2821, paragraph 21).

35 If, as in the main proceedings in the present cases, the grant of child-raising allowance — which is a family benefit — were subject to the condition that the spouse

of a worker, who is not resident in Germany, must be employed within the territory to which the BErzGG applies, the worker could be deterred from exercising his right to freedom of movement.

36 Consequently, it would be contrary to the purpose and spirit of Article 73 of Regulation No 1408/71 to deprive a worker's spouse of a benefit to which he or she would have been entitled if the spouse had remained in the State providing that benefit.

37 Lastly, as the Advocate General observes in point 50 of his Opinion, family benefits by their nature cannot be regarded as payable to an individual in isolation from his family circumstances. Since the grant of a benefit such as German child-raising allowance is intended to meet family expenses, the choice of the parent who is to receive the allowance is not of importance.

38 It follows from all the foregoing considerations that, where an employed person is subject to the legislation of a Member State and lives with his or her family in another Member State, that person's spouse is entitled, under Article 73 of Regulation No 1408/71, to receive a benefit such as child-raising allowance in the State of employment.

Question 2(b) in Case C-245/94

39 By Question 2(b) in Case C-245/94, the national court seeks to ascertain whether a national rule which, like Paragraph 1(4) of the BErzGG, provides that nationals of a Member State who are in employment in Germany can claim child-raising allowance only if their employment entails a significant number of working hours

constitutes discrimination on grounds of sex, contrary to Article 4(1) of Directive 79/7.

40 In order to answer that question, it is first necessary to examine whether a child-raising allowance such as that provided for by Paragraph 1 et seq. of the BErzGG falls within the scope of Directive 79/7.

41 According to the wording of Article 3(1)(a) of Directive 79/7, that directive applies to statutory schemes which provide protection against the risks of sickness, invalidity, old age, accidents at work and occupational diseases, and unemployment. According to Article 3(2), that directive does not apply to provisions concerning family benefits, except in the case of family benefits granted by way of increases of benefits due in respect of the risks referred to in paragraph 1(a).

42 A family benefit such as child-raising allowance does not provide direct and effective protection against one of the risks listed in Article 3(1) of Directive 79/7.

43 As is apparent from the order for reference, such a benefit is intended to secure the maintenance of the family during the stage in which the children are raised.

44 Consequently, it must be stated in reply to Question 2(b) in Case C-245/94 that Article 3(1) and (2) of Directive 79/7 must be interpreted as meaning that a child-raising allowance such as that provided for by Article 1 et seq. of the BErzGG does not fall within the scope of that directive.

Question 3 in Cases C-245/94 and C-312/94

45 By Question 3 in Cases C-245/94 and C-312/94, the national court seeks guidance from the Court of Justice on the matters and persons covered by Regulation No 1612/68. However, an answer to that question is sought only in the event that a benefit such as child-raising allowance cannot be regarded as a family benefit within the meaning of Regulation No 1408/71. In view of the answer given to Question 1, there is no need to reply to Question 3.

Costs

46 The costs incurred by the German, Spanish, French, Luxembourg and United Kingdom Governments and by 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 proceedings 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 Landessozialgericht Nordrhein-Westfalen, by orders of 17 June and 19 August 1994, hereby rules:

1. **A benefit such as the child-raising allowance provided for by the Bundeserziehungsgeldgesetz, which is automatically granted to persons fulfilling**

certain objective criteria, without any individual and discretionary assessment of personal needs, and which is intended to meet family expenses, must be treated as a family benefit within the meaning of Article 4(1)(h) 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, in the version amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989.

2. **Where an employed person is subject to the legislation of a Member State and lives with his or her family in another Member State, that person's spouse is entitled, under Article 73 of Regulation No 1408/71, to receive a benefit such as child-raising allowance in the State of employment.**

3. **Article 3(1) and (2) of Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security must be interpreted as meaning that a child-raising allowance such as that provided for by Article 1 et seq. of the Bundeserziehungsgeldgesetz does not fall within the scope of that directive.**

Moitinho de Almeida Sevón Edward

Jann Wathelet

Delivered in open court in Luxembourg on 10 October 1996.

R. Grass J. C. Moitinho de Almeida

Registrar President of the Fifth Chamber