

JUDGMENT OF THE COURT (Grand Chamber)

7 June 2005^{*}

In Case C-543/03,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht Innsbruck (Austria), made by decision of 16 December 2003, received at the Court on 29 December 2003, in the proceedings

Christine Dodl,

Petra Oberhollenzer

v

Tiroler Gebietskrankenkasse,

* Language of the case: German.

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans and A. Rosas, Presidents of Chambers, C. Gulmann, J.-P. Puissochet, K. Schiemann (Rapporteur), J. Makarczyk, P. Küris, E. Juhász, U. Löhmus, E. Levits and A. Ó Caoimh, Judges,

Advocate General: L.A. Geelhoed,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 14 December 2004,

after considering the observations submitted on behalf of:

— C. Dodl and P. Oberhollenzer, by J. Hobmeier, Rechtsanwalt,

— the Tiroler Gebietskrankenkasse, by A. Bramböck, acting as Agent,

- the Austrian Government, by H. Dossi, E. Riedl and G. Hesse, acting as Agents, and S. Holzmann, Rechtsanwältin,

- the German Government, by W.-D. Plessing and A. Tiemann, acting as Agents,

- the Finnish Government, by A. Guimaraes-Purokoski, acting as Agent,

- the Commission of the European Communities, by D. Martin, H. Kreppel and B. Martenczuk, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 24 February 2005,

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Community regulations relating to the coordination of social security schemes. It refers, in

particular, to Council Regulation (EEC) No 1408/71 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 Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 (OJ 2001 L 187, p. 1) (hereinafter ‘Regulation No 1408/71’), as well as to Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71 (OJ English Special Edition 1972(I), p. 159), as amended and updated by Commission Regulation (EC) No 410/2002 of 27 February 2002 (OJ 2002 L 62, p. 17) (hereinafter ‘Regulation No 574/72’).

- 2 The reference was made in the course of proceedings between Ms Dodl and Ms Oberhollenzer and the Tiroler Gebietskrankenkasse (Tyrol Regional Health Insurance Fund) concerning the latter’s refusal to grant them childcare allowances.

Law

Community legislation

Regulation No 1408/71

- 3 Article 2(1) of Regulation No 1408/71 provides:

“This Regulation shall apply to employed or self-employed persons ... who are or have been subject to the legislation of one or more Member States and who are

nationals of one of the Member States ... as well as to the members of their families and their survivors.'

4 Article 4(1) of that regulation provides:

'This Regulation shall apply to all legislation concerning the following branches of social security:

...

(h) family benefits.'

5 According to Article 13 of the same regulation:

'1. ... persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title;

2. ...

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State ...;

...'

6 Under Article 73 of Regulation No 1408/71, which concerns employed or self-employed persons, the members of whose families reside in a Member State other than the competent State:

'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 ...'.

7 Article 76(1) of the same regulation, which lays down rules of priority in cases of overlapping entitlement to family benefits under the legislation of the competent State and under the legislation of the Member State of residence of the members of the family, provides:

'Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the

Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Articles 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.'

Regulation No 574/72

8 Article 10(1) of Regulation No 574/72, which lays down the rules applicable to employed or self-employed persons in the case of overlapping of rights to family benefits or family allowances, provides:

'(a) Entitlement to 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, benefits are due only in pursuance of the national legislation of another Member State or in application of Articles 73, 74, 77 or 78 of the Regulation, up to the sum of those benefits.

(b) However, where a professional or trade activity is carried out in the territory of the first Member State:

(i) in the case of benefits due either only under national legislation of another Member State or under Articles 73 or 74 of the Regulation to the person

entitled to family benefits or to the person to whom they are to be paid, the right to family benefits due either only under national legislation of that other Member State or under these Articles shall be suspended up to the sum of family benefits provided for by the legislation of the Member State in whose territory the member of the family is residing. The cost of the benefits paid by the Member State in whose territory the member of the family is residing shall be borne by that Member State;

...'

National legislation

Austrian law

- 9 According to Article 2(1) of the Law on Compensation for Family Expenses (Familienlastenausgleichsgesetz) of 24 October 1967 (BGBl. I, 376/1967), in the amended version applicable to the case in the main proceedings:

'Persons who have their domicile or permanent residence in Federal territory are entitled to family allowance ...'.

10 Paragraph 2 of the Law on Childcare Allowance (Kinderbetreuungsgeldgesetz) of 8 August 2001 (BGBl. I, 103/2001), which came into force on 1 January 2002, provides:

‘1. A parent ... shall be entitled to childcare allowance for his or her child ... where

(1) there is an entitlement to family allowance for that child under the Familienlastenausgleichsgesetz ... or where there is no such entitlement for that child simply because there is an entitlement to a similar foreign benefit;

(2) the parent lives in the same household as the child; and

(3) the total material amount of the parent’s income (Paragraph 8) during the calendar year does not exceed the limit of EUR 14 600.00. ...

4. Childcare allowance cannot be drawn by both parents simultaneously for the same child.

...'

German law

- 11 According to Paragraph 1 of the Federal Law on the Grant of Child-raising Allowance and Parental Leave (Bundeserziehungsgeldgesetz) of 7 December 2001 (BGBl. 2001 I No 65):

'1. Any person who:

(1) is permanently or ordinarily resident in Germany;

(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.

...'

The main proceedings and the questions referred for a preliminary ruling

- 12 The two claimants in the main proceedings, Ms Dodl and Ms Oberhollenzer, are Austrian nationals working in Austria but resident in Germany. They live with their husband and partner respectively, both of whom are German nationals working full-time in Germany.
- 13 Following the birth of her son on 21 April 2002, Ms Dodl took unpaid maternity leave from 21 June 2002 to 7 October 2002.
- 14 Ms Oberhollenzer gave birth to her son on 10 September 2002 and consequently took unpaid maternity leave from 8 November 2002 to 9 September 2004.
- 15 As fathers, Ms Dodl's husband and Ms Oberhollenzer's partner received the child allowance in Germany that corresponds to Austrian family allowance, but they did

not receive the German national child-raising allowance because they were in full-time employment.

- 16 The applications for payment of the Federal child-raising allowance which the claimants in the main proceedings lodged in Germany were refused, in respect of Ms Dodl, by decision of the Amt für Versorgung und Familienförderung München I (Munich I Benefit and Family Support Office) of 13 May 2003 and, in respect of Ms Oberhollenzer, by decisions of the Amt für Versorgung und Familienförderung Augsburg (Augsburg Benefit and Family Support Office) of 14 November 2002 and 22 April 2003. The reason given by the German authorities was that, in their view, the Republic of Austria was responsible for payment of the allowance sought. In addition, in Ms Dodl's case, it was also argued that the income limit applicable under German law had been exceeded.
- 17 The claimants also attempted to obtain a childcare allowance in Austria.
- 18 Their applications were rejected by decisions of the Tiroler Gebietskrankenkasse dated 28 April and 5 June 2003 respectively, those decisions being based on Articles 73, 75 and 76 of Regulation No 1408/71 in conjunction with Article 10(1)(b) of Regulation No 574/72.
- 19 The claimants in the main proceedings each challenged those decisions in the Landesgericht Innsbruck (Regional Court, Innsbruck) and asked for an order that the Tiroler Gebietskrankenkasse award them childcare allowance in the statutory

amount as from 1 July 2002 in respect of Ms Dodl and 30 September 2002 in respect of Ms Oberhollenzer. In support of their applications, they argued that the principle that the State of employment is responsible for payment should have been applied, in response to which the Tiroler Gebietskrankenkasse claimed that where there are two different Member States of employment, it is the State of residence that has foremost responsibility for payment of family benefit. It is only after payment of the German child-raising allowance that the Republic of Austria might be required to make a top-up payment of childcare allowance in certain circumstances.

20 The Landesgericht Innsbruck dismissed Ms Dodl's and Ms Oberhollenzer's actions by judgments of 17 July 2003 and 17 September 2003 respectively. The court considered that where parents work in different Member States, the State that should have primary responsibility for the payment of family benefit is the one in which the child is permanently resident, in this case, the Federal Republic of Germany. If the German benefit were lower than the Austrian benefit, the Republic of Austria would be liable to pay only the difference.

21 The claimants in the main proceedings lodged appeals against those judgments before the Oberlandesgericht Innsbruck (Innsbruck Higher Regional Court). In support of their appeals, they maintain that, inasmuch as the purpose of childcare allowance is to provide an income for the parent who is on unpaid leave from his or her occupation in order to care for a child and who therefore sustains loss of earnings, the principle that the State of employment is responsible for payment should apply. Ms Dodl and Ms Oberhollenzer point out that, at the time material to the main proceedings, they were still in an employment relationship, which was merely suspended for the duration of their parental leave.

22 The Tiroler Gebietskrankenkasse disputed that argument and asked for the claims to be dismissed.

23 Having joined the two cases for the purposes of a common procedure and judgment, the Oberlandesgericht Innsbruck decided to stay proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

(1) Is Article 73 of Regulation (EEC) No 1408/71 ... in conjunction with Article 13 of that regulation, as amended, to be interpreted as extending even to employed persons whose employment relationships are still in existence but do not involve any duty to carry out work or pay remuneration (unpaid leave) or any social security obligations under national law?

(2) If the answer to the first question should be in the affirmative:

Is the State of the place of employment responsible for the benefit payment in such a case even if the employed person and those members of his or her family

for whom family benefit such as Austrian “Kinderbetreuungsgeld” (childcare allowance) might be payable have not lived in the State of the place of employment, particularly during the period of unpaid leave?’

Substance

The first question

- 24 By its first question, the national court is essentially asking whether the claimants in the main proceedings have lost the status of ‘employed persons’ within the meaning of Regulation No 1408/71 as a result of the suspension of their employment relationship during which, under Austrian law, they were not required to pay social security contributions. More particularly, the national court queries the effects of such a suspension on the application of Article 13(2)(a) of Regulation No 1408/71 and, consequently, of Article 73 of the same regulation.
- 25 It seems that the national court’s main concern underlying the first question is the risk that the claimants in the main proceedings could escape all social protection, so far as the award of family benefits is concerned, if their employment relationship does not qualify as employment on account of its suspension.

- 26 All the parties which submitted written observations are agreed that in spite of the temporary suspension of their employment relationship, the claimants are 'employed persons' within the meaning of Article 1(a) of Regulation No 1408/71.
- 27 In that connection, it must be pointed out that there is no single definition of worker/employed or self-employed person in Community law; it varies according to the area in which the definition is to be applied (Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 31). It is therefore necessary to consider the meaning of the term 'employed person' that is envisaged in the context of Regulation No 1408/71.
- 28 Article 2(1) of Regulation No 1408/71 states that the regulation is to apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States as well as to the members of their families.
- 29 The terms 'employed person' and 'self-employed person' are defined by Article 1(a) of Regulation No 1408/71. They designate any person insured under one of the social security schemes mentioned in the aforementioned Article 1(a) for the contingencies and under the conditions mentioned in that provision (Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 9, and Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 20).

30 Accordingly a person has the status of an ‘employed person’ within the meaning of Regulation No 1408/71 where he is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme mentioned in Article 1(a) of that regulation, irrespective of the existence of an employment relationship (*Martínez Sala*, cited above, paragraph 36, and *Kuusijärvi*, cited above, paragraph 21).

31 Thus, as the Advocate General pointed out in paragraph 12 of his Opinion, in the light of the case-law of the Court, it is therefore not the status of the employment relationship which determines whether or not a person continues to fall within the scope *ratione personae* of Regulation No 1408/71, but the fact that he or she is covered against risks under a social security scheme mentioned in Article 1(a) of that regulation. It follows from this that the mere suspension of the main obligations of an employment relationship for a given period of time cannot deprive the employee of his or her status as an ‘employed person’ within the meaning of Article 73 of that regulation.

32 It is apparent from the decision to refer that, under Austrian law, the claimants in the main proceedings were not, during the period of their parental leave, covered by full compulsory insurance (including health, accident and retirement insurance) as persons employed full-time are. According to the information provided by the national court, once compulsory insurance ceases the claimants are entitled to benefits only under the health insurance scheme — subject to certain conditions. The national court assumes that, in certain circumstances, the claimants in the main proceedings could therefore fall back on sickness benefits.

33 In any event, it is for the national court to make the necessary enquiries to determine whether the claimants in the main proceedings belonged to a branch of the Austrian social security system during the periods in respect of which the allowances in issue were applied for and, accordingly, whether they were 'employed persons' within the meaning of Article 1(a) of Regulation No 1408/71.

34 The answer to the first question must therefore be that a person has the status of an 'employed person' within the meaning of Regulation No 1408/71 where he is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme mentioned in Article 1(a) of that regulation, irrespective of the existence of an employment relationship. It is for the national court to make the necessary enquiries to determine whether the claimants in the main proceedings belonged to a branch of the Austrian social security system during the periods in respect of which the allowances in issue were applied for and, accordingly, whether they were 'employed persons' within the meaning of Article 1(a).

The second question

35 By its second question, the national court asks which Member State is primarily responsible for paying the family benefit in issue if the claimants in the main proceedings are persons covered by Regulation No 1408/71, which presupposes that the Court of Justice will rule on the possible relevance and, if appropriate, the application of the rules against overlapping, namely Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72, in circumstances such as those of the case in the main proceedings.

Observations submitted to the Court

36 The observations submitted to the Court differ as regards the interpretation of Regulations No 1408/71 and No 574/72 and determination of the Member State responsible for the payment of benefits.

37 Thus, the Tiroler Gebietskrankenkasse argued that since each of the two parents carries on an occupation, one in Germany and the other in Austria, there must be two different States of employment. The resulting overlapping of benefits is resolved in Article 76 of Regulation No 1408/71, which establishes that priority is to be given to the Member State of residence which is consequently responsible for the payment of family benefits, the other State having only secondary responsibility.

38 The Austrian Government also advocates that solution whilst pointing out that, following the Court's reasoning in Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895 in relation to family benefits, the determination of which family members trigger entitlement to benefits cannot depend on national legislation. Rather, the family as a whole should be taken into consideration.

39 The German Government puts forward two arguments in support of the contrary view. It argues, first, that the principle invoked by the Austrian Government and set out by the Court in *Hoever and Zachow* (cited above) is not relevant to the present case because of the particular circumstances of the case which gave rise to that

judgment. The approach taken by the Court in that case ought, in fact, to be reserved for those cases in which the persons concerned find that they do not have rights in relation to the State of employment.

40 Second, the German Government considers that the rules against overlapping in Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72 do not apply in the present case because there are no simultaneous rights to family benefits for the same child. In the circumstances of the case in the main proceedings, the other parent has no such right, since the fathers of the children do not fulfil the conditions of entitlement to the allowances under German law.

41 Accordingly, the German Government concludes that, in accordance with Article 73 of Regulation No 1408/71, it is for the State of employment alone, in this case, the Republic of Austria, to pay the family benefit even if the recipient and the recipient's family are not resident in that State.

42 The Commission of the European Communities supported that conclusion in its written observations. It argued that since the State of employment principle is fundamental to Regulations No 1408/71 and No 574/72, other solutions need be sought only if application of that principle would have unacceptable consequences — in particular, loss of entitlement to the family benefit.

43 However, at the hearing the Commission indicated that it had reconsidered its position in favour of the Member State of residence having primary responsibility, and it asked the Court to take into account the family circumstances of the

claimants in the main proceedings. According to the Commission, the provision which governs their situation is thus Article 10(1)(b) of Regulation No 574/72, which suspends the entitlement provided for in Article 73 of Regulation No 1408/71 where the spouse of the employed person carries out a professional or trade activity in the Member State of residence. Such an approach would be fully consistent with the judgment in Case C-119/91 *McMenamin* [1992] ECR I-6393, which is directly relevant to the present case.

Findings of the Court

- ⁴⁴ In order to resolve the difficulty in interpreting Regulations Nos 1408/71 and 574/72 which is at the heart of the negative conflict of competence in the case in the main proceedings, and to give the national court an answer which will be of assistance, it is necessary, for the purpose of answering the second question, to consider the scope of Article 73 of Regulation No 1408/71, to examine how it relates to the provisions against overlapping in those regulations and to determine which of those provisions applies in this case.
- ⁴⁵ As is apparent from its wording, the said Article 73 covers precisely the situation in which the family of an employed person is resident in a Member State other than the competent State, and it guarantees the grant of the family benefits provided for by the applicable legislation of the latter as if the employed person's family was resident in its territory.
- ⁴⁶ That provision is intended 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, in particular, *Hoever and Zachow*, cited above, paragraph 34, and Case C-333/00 *Maaheimo* [2002] ECR I-10087, paragraph 34).

47 Article 73 of Regulation No 1408/71 goes together with the rule laid down in Article 13(2)(a) of the same regulation which states that a worker employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State. That arrangement stems from the objective of Regulation No 1408/71, which is to guarantee all workers who are nationals of the Member States and who move within the Community equality of treatment in regard to the different national laws and the enjoyment of social security benefits irrespective of the place of their employment or of their residence, and it must be interpreted uniformly in all Member States regardless of the arrangements made by national laws on the acquisition of entitlement to family benefits (Case 104/80 *Beeck* [1981] ECR 503, paragraph 7).

48 It must therefore be noted that, for the purposes of the combined provisions of Article 73 and Article 13(2)(a) of Regulation No 1408/71, the claimants in the main proceedings, who reside with their families in a Member State other than the State of employment, acquire entitlement under Community law to family allowances in the latter State.

49 It must be pointed out, however, that whilst the said Article 73 constitutes a general rule, it is not an absolute rule. The entitlement which the claimants in the main proceedings derive, in their capacity as 'employed persons', from Article 13 and Article 73 of Regulation No 1408/71 must be set against the rules against overlapping in that regulation and in Regulation No 574/72, since there is a risk that entitlement under the legislation of the State of residence could overlap with that under the legislation of the State of employment.

50 It appears that that is the case here. According to information from the national court, the birth of each claimant's child gives rise to an entitlement to family allowances in Austria and in Germany. In Austria, entitlement to childcare allowance vests in the mother in her capacity as an employed person in that Member State in application of Article 73 of Regulation No 1408/71. In Germany, under German law, one of the parents is entitled to receive a child-raising allowance on the basis that that parent and his or her child are resident there.

51 Circumstances such as those of the case in the main proceedings can result in overcompensation of family expenses and must therefore be considered in the light of the provisions against overlapping, namely Article 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72.

52 It is appropriate to consider in turn the possible situations to which the said provisions are intended to apply.

53 It is apparent from the wording of Article 76 of Regulation No 1408/71 that that provision is intended to resolve cases where entitlement to family benefits under Article 73 of that regulation overlaps with entitlement under the national legislation of the family members' State of residence by reason of the carrying on of an occupation. It is common ground that Article 76 is not relevant in the present case, since entitlement to family benefits under German law is conditional on the claimant's being resident in Germany and having no, or no full-time, employment.

54 On the other hand, Article 10 of Regulation No 574/72 applies where there is a risk of overlap between entitlement under Article 73 of Regulation No 1408/71 and

entitlement to receive family benefits under the national legislation of the State of residence, irrespective of any such professional or trade activity.

- 55 It follows that Article 10 of Regulation No 574/72 is the relevant provision against overlapping in the present case. It covers situations in which only one of the parents carries out a professional or trade activity as well as situations in which both parents do so.
- 56 Article 10(1)(a) of the said regulation provides, in particular, that where family benefits are due in the child's State of residence, irrespective of conditions of insurance or employment, such entitlement is to be suspended where benefits are due in application of Article 73 of Regulation No 1408/71.
- 57 However, where a professional or trade activity is carried out in the child's State of residence by the person entitled to the family benefits or by the person to whom they are paid, Article 10(1)(b)(i) of Regulation No 574/72 provides for the suspension of entitlement to those benefits which exist in the State of employment under Article 73 of Regulation No 1408/71.
- 58 In *McMenamin*, cited above, paragraphs 24 and 25, the Court clarified the meaning of the periphrasis 'the person entitled to the family benefits or family allowances, or

the person to whom they are paid'. It held that it must be understood as encompassing in particular, apart from the spouse, a person who is not or is no longer married to the person entitled to benefits in pursuance of Article 73 of Regulation No 1408/71 or that person himself if the overlapping entitlement to family allowances arises because that person is also working in the State of residence. The legislature chose to define that group of persons by their common characteristic, namely their status as persons entitled to family allowances in the Member State of residence, rather than by giving an exhaustive list.

59 The Court then held that the exercise by a person having the care of children, and, in particular, by the spouse of the person entitled in pursuance of Article 73 of Regulation No 1408/71, of a professional or trade activity in the Member State of residence of the children suspends, under Article 10 of Regulation No 574/72, the right to allowances in pursuance of Article 73 of Regulation No 1408/71 up to the amount of the allowances of the same kind actually paid by the Member State of residence, irrespective of who is designated as directly entitled to the family allowances by the legislation of that State (*McMenamin*, cited above, paragraph 27).

60 That interpretation of Article 10(1)(b)(i) of Regulation No 574/72 can be directly applied to situations such as that in the case in the main proceedings with regard to the exercise by Ms Dodl's spouse and Ms Oberhollenzer's partner of a professional or trade activity in the Member State of residence. Consequently, it is that State, in this case, the Federal Republic of Germany, which is responsible for paying the family benefits in issue.

61 It must be added that, contrary to the German Government's argument, the fact that the fathers of the children do not fulfil the conditions of entitlement to the

allowances provided for by the German legislation because of their full-time professional or trade activity is irrelevant to the application of Article 10(1)(b)(i) of Regulation No 574/72.

- 62 In order for that article to apply and thereby to trigger the reversal of priorities in favour of the competence of the Member State of residence, it is not necessary for the professional or trade activity to be carried out by the person who is personally entitled to the family benefits. It is sufficient for entitlement to allowances in the State of residence to vest in one of the parents — in this case, the mother.
- 63 However, it is important to point out that in the situation referred to by the national court, where Ms Dodl was not entitled to the German child-raising allowance on the ground that the income limit applicable under the German legislation had been exceeded, and where her husband was not entitled to it either because he was in full-time employment, Ms Dodl's circumstances are governed solely by Article 73 of Regulation No 1408/71 and there is no need to resort to the rules against overlapping provided for in that regulation and in Regulation No 574/72.
- 64 The answer to the second question must therefore be that where the legislation of the Member State of employment and that of the Member State of residence of an employed person each provide for an entitlement to family benefits in respect of the same member of that person's family and for the same period, the Member State responsible for paying those benefits is, in principle, the Member State of employment pursuant to Article 10(1)(a) of Regulation No 574/72. However, where a person having the care of children, in particular the spouse or partner of the

employed person, carries out a professional or trade activity in the Member State of residence, the family benefits must be paid by that Member State in application of Article 10(1)(b)(i) of Regulation No 574/72, irrespective of who is designated as directly entitled to those benefits by the legislation of that State. In that situation, the payment of family benefits by the Member State of employment is to be suspended up to the sum of family benefits provided for by the legislation of the Member State of residence.

Costs

- 65 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. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Grand Chamber) hereby rules:

- 1. A person has the status of an employed or self-employed person within the meaning of Council Regulation (EEC) No 1408/71 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 Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 where he is covered, even if only in respect of a single risk, on a compulsory or optional basis, by a general or special social security scheme mentioned in Article 1**

(a) of that regulation, irrespective of the existence of an employment relationship. It is for the national court to make the necessary enquiries to determine whether the claimants in the main proceedings belonged to a branch of the Austrian social security system during the periods in respect of which the allowances in issue were applied for and, accordingly, whether they were 'employed persons' within the meaning of Article 1(a).

2. Where the legislation of the Member State of employment and that of the Member State of residence of an employed person each provide for an entitlement to family benefits in respect of the same member of that person's family and for the same period, the Member State responsible for paying those benefits is, in principle, the Member State of employment pursuant to Article 10(1)(a) of Council Regulation (EEC) No 574/72 of 21 March 1972 fixing the procedure for implementing Regulation No 1408/71, as amended and updated by Commission Regulation (EC) No 410/2002 of 27 February 2002.

However, where a person having the care of children, in particular the spouse or partner of the employed person, carries out a professional or trade activity in the Member State of residence, the family benefits must be paid by that Member State in application of Article 10(1)(b)(i) of Regulation No 574/72, as amended by Regulation No 410/2002, irrespective of who is designated as directly entitled to those benefits by the legislation of that State. In that situation, the payment of family benefits by the Member State of employment is to be suspended up to the sum of family benefits provided for by the legislation of the Member State of residence.

[Signatures]