JUDGMENT OF THE COURT
15 January 1986 *

In Case 41/84

REFERENCE to the Court under Article 177 of the EEC Treaty by the Cour de cassation [Court of Cassation] of the French Republic for a preliminary ruling in the proceedings pending before that court between

Pietro Pinna

and

Caisse d'allocations familiales de la Savoie [Family Allowances Fund, Savoie]

on the interpretation of Article 73 (2) of Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT

composed of: Lord Mackenzie Stuart, President, U. Everling, K. Bahlmann and R. Joliet (Presidents of Chambers), G. Bosco, T. Koopmans, O. Due, Y. Galmot and T. F. O'Higgins, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

after considering the observations submitted on behalf of

(a) Pietro Pinna, plaintiff in the main proceedings, by A. Lyon-Caen, Avocat at the Conseil d'État and at the French Cour de cassation,

* Language of the Case: French.

(b) the Caisse d'allocations familiales de la Savoie, defendant in the main proceedings, by J.-P. Desache, of the Paris Bar,

(c) the Government of the French Republic, by P. Pouzoulet, Secretary responsible for Foreign Affairs, Ministry for Foreign Relations,

(d) the Government of the Hellenic Republic, by E. Tsekouras, a member of the Legal Department of the Greek Permanent Representation at the European Communities, Brussels, acting as Agent,

(e) the Government of the Italian Republic, by A. Squillante, President of Chamber at the Council of State, Head of the Department of Contentious Diplomatic Affairs, Treaties and Legislative Matters, assisted by P. Ferri, Avvocato dello Stato,

(f) the Commission of the European Communities, by J. Griesmar, Legal Adviser, acting as Agent, assisted by F. Herbert, of the Brussels Bar,

(g) the Council of the European Communities, by J. Carberry, Adviser in the Legal Department, acting as Agent,

after hearing the Opinion of the Advocate General delivered at the sitting on 21 May 1985,

gives the following

JUDGMENT

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

Decision

1 By an order of 11 January 1984, which was received at the Court on 15 February 1984, the French Cour de cassation referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty two questions on the interpretation of several provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community.

2 The questions were raised in the course of proceedings concerning the refusal of the Caisse d'allocations familiales de la Savoie (hereinafter referred to as 'the Fund') to grant Mr Pinna family benefits for periods in 1977 and 1978.

3 Mr Pinna, an Italian national, resides in France with his wife and their two children, Sandro and Rosetta. In 1977 the children went to Italy with their mother for an extended visit. The Fund refused to pay Mr Pinna family benefits for Sandro in respect of the period from 1 October 1977 to 31 December 1977 and for Rosetta in respect of the period from 1 October 1977 to 31 March 1978 on the ground that the benefits should be paid by the Istituto Nazionale della Previdenza Sociale [National Social Security Institution] at Aquila, the place in Italy where the children had been staying at the material times.

4 It appears from the Cour de cassation's order requesting a preliminary ruling that Article 511 of the French Social Security Code provides that any French or foreign national residing in France who, as head of household or otherwise, has one or more dependent children residing in France is entitled in respect of those children to the family benefits which are listed in Article L. 510. According to the former Article 6 of Decree No 46-2880 of 10 September 1946 as amended by Decree No 65-542 of 29 June 1965, and Article 2 of the Decree of 10 December 1946 as amended by the Decree of 17 March 1978, a child who, while maintaining family ties in metropolitan France, where he has hitherto permanently resided, stays temporarily outside that country on one or more occasions the total duration of which does not exceed three months in any one calendar year is deemed to reside in France. The decision with which these proceedings are concerned appears to be based on Article 73 (2) of Regulation No 1408/71, which provides that an employed person subject to French legislation is to be entitled

'in respect of members of his family residing in the territory of a Member State other than France, to the family allowances provided for by the legislation of the Member State in whose territory those members of the family reside; the employed person must satisfy the conditions regarding employment on which French legislation bases entitlement to such benefits'.

5 In the course of an appeal brought by Mr Pinna, the Cour de cassation asked the Court to rule on:

(1) The validity and continued applicability of Article 73 (2) of Regulation No 1408/71 of 14 June 1971;

(2) The interpretation of the word 'residence' in the context of that provision.

6 Article 73 (1) of Regulation No 1408/71 provides that:

'An employed person subject to the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State.'

7 Article 73 (2), quoted above, lays down a different rule with regard to employed persons subject to French legislation where members of their families reside in a Member State other than France.

8 Article 98 (now Article 99) of Regulation No 1408/71 provides that:

'Before 1 January 1973 the Council shall, on a proposal from the Commission, re-examine the whole problem of payment of family benefits to members of families who are not residing in the territory of the competent State, in order to reach a uniform solution for all Member States.'

9 According to the documents before the Court, the Commission submitted to the Council on 10 April 1975 — somewhat late owing to the accession of new Member States — a proposal for a regulation (Official Journal C 96, p. 4) in which it proposed that the system of granting the family benefits of the country of employment irrespective of the country of residence of the members of the worker's family should be adopted generally. That solution was endorsed by the European Parliament (opinion of 14 October 1975, Official Journal C 257) and by the Economic and Social Committee (opinion of 24 September 1975, Official Journal C 286). The Council discussed the matter at the sessions held on 18 December 1975 and 9 December 1976 but no decision was reached.

10 As regards the validity of Article 73 (2), Mr Pinna argues that the provision has the effect of reducing allowances and treating workers from Community countries who are employed in France differently from Community workers employed in the nine other Member States. He contends that there is no political, economic or legal justification for such discrimination. As regards retirement pensions the Court has ruled that Article 51 empowers the Council to confer rights on migrant workers but does not authorize it to deprive them of rights enjoyed under national legislation. Mr Pinna argues that what is valid for retirement pensions is also valid for family benefits. The concurrent application of the law of the country of employment (conferral of entitlement) and of the law of the country of residence of the worker's family (nature and rate of benefits) is not intended to result in decreased social protection. Consequently, he contends that Article 73 (2) conflicts with Article 51 of the Treaty. In Mr Pinna's view, Article 51 introduced the principle of exportable benefits. The result is that the recipient of any cash benefit is entitled to rely on Article 51, no matter where he establishes his residence or that of his family, in order to claim that the benefits due should be paid to him in the place where he has decided that they should be paid. The partial 'non-exportability' of one type of social benefit, under Article 73 (2), conflicts with the general rule laid down in Article 51. By making French family benefits 'non-exportable', Article 73 (2) is in breach of Article 51 of the Treaty.

11 The Fund which is the defendant in the main proceedings argues that Article 73 (2) is compatible with Articles 48 and 51 of the Treaty. Article 51 provides that migrant workers must always be paid benefits. Article 73 (2) ensures that the migrant worker always receives family allowances irrespective of his family's place of residence. The institution from which payment is due and the legislation applicable to the allowances differ from those prescribed in the case of a worker coming within the scope of Article 73 (1), but the worker's entitlement to receive family allowances remains intact. In the Fund's opinion, Article 73 (2) is compatible with Article 7 of the Treaty, since it in no way introduces discrimination between migrant workers. There is no doubt that in some cases the migrant worker's benefits may be reduced depending on his family's chosen country of residence, but that reflects differences in national legislation, in particular as regards the amount of benefit. Accordingly, Article 73 (2) itself is manifestly not a source of discrimination. As a result, the Fund argues, Article 73 (2) is compatible with Community law.

12 The French Government considers that Article 73 (2) is valid. Any differences of treatment resulting from that provision do not amount to discrimination contrary to Articles 7, 48 and 51 of the Treaty. The reason for the difference in treatment to the detriment of non-French workers subject to French legislation is in fact the disparities existing between the systems of family allowances in force in the various Member States. The only way of eliminating those differences of treatment would be to harmonize national social security systems. That is not the aim of Regulation No 1408/71, which simply seeks to coordinate those systems with a view to eliminating, in the sphere of social security, obstacles to the free movement of workers.

13 The Greek Government argues that the object of Regulation No 1408/71 is to secure for all employed persons moving within the Community who are nationals of Member States equal treatment under the legislation of the various Member States and the payment of social security benefits. Problems regarding the award of family benefits to employed persons subject to the legislation of a Member State other than the Member State in which their families reside should therefore be resolved uniformly throughout the Community. In the Greek Government's view, the authors of the regulation appreciated that need when they drafted Article 98. Achievement of a uniform solution, within the meaning of Article 98, consists in adopting as a criterion the worker's place of employment. The Greek Government argues that relying on the system in force at the worker's place of employment is in keeping with, on the one hand, the spirit of Regulation No 1408/71, which is to ensure the free movement of workers within the Community, and, on the other hand, the principle of equal treatment in matters of social security for foreign and national workers. The Greek Government considers that Article 73 (2) is not justified, in so far as it does not promote equal treatment as between migrant and national workers as regards the payment of family benefits where the members of the worker's family are resident in a country other than the country of residence of the worker himself. The migrant worker must be entitled to social security benefits in accordance with the legislation to which he is subject and pursuant to which he pays contributions and taxes.

14 The Italian Government argues that Article 73 (2) gives rise to discrimination on grounds of nationality between workers employed in the same country. According to a consistent line of decisions of the Court, legislation under which any move by a worker from one Member State to another results in a reduction in his acquired rights in respect of social security is contrary to the guarantees provided by the

Treaty with regard to the free movement of workers. Application of the legislation of the Member State of residence for the purpose of calculating family allowances is designed to reduce the substance of the rights acquired by the worker under French law.

15 The Commission considers that Article 73 (2) is compatible with Article 51 of the Treaty. It does not deny that in certain circumstances the application of Article 73 (2) may have the result that a worker whose children reside in another Member State is entitled to family allowances lower than those payable if the members of his family resided in France, or if French family allowances were extended to members of the family residing in another Member State. However, it considers that Article 73 (2) does not result in discrimination contrary to the Treaty. In the Commission's view the differences observed are essentially due to the fact that Regulation No 1408/71 is an instrument for attaining the objectives of Article 51 of the Treaty by coordinating social security systems with a view to eliminating obstacles to the free movement of persons.

16 The Council states that the questions referred by the national court call the validity of Article 73 (2) in question for two reasons. The first is that Article 73 (2) is an exceptional derogation on which it was deemed necessary from the outset to impose a time-limit, namely 1 January 1973. The second is that non-French workers subject to French legislation suffer two-fold discrimination as compared with French workers on the one hand and workers subject to the legislation of a Member State other than France on the other. The Council contends that such two-fold discrimination does not exist. French and foreign workers receive identical allowances in France; French workers lose their right to their allowances after three months if their children are no longer resident in French territory, whilst migrant workers receive allowances under Regulation No 1408/71 in respect of their children who reside in a Member State other than France. Moreover, in the Council's view, no discrimination is discernible in the way in which migrant workers are treated in two or more different Member States since the social security legislation of the Member States is merely coordinated. As regards social security each Member State has retained the power to determine the nature and amount of the benefits since Article 51 does not require the Council to set up a uniform social security system for the Member States of the Community.

The first question

17 In order to settle the question at issue it is appropriate to point out, in the first place, that Article 40 of Regulation No 3/58 of the Council of 25 September 1958 concerning social security for migrant workers (*Journal Officiel* No 30, p. 561) provided that a wage-earner or assimilated worker who was employed in the territory of one Member State and had children who were permanently resident or were being brought up in the territory of another Member State was to be entitled, in respect of such children, to family allowances according to the provisions of the legislation of the former State up to the amount of the allowances granted under the legislation of the latter State.

18 Regulation No 1408/71 amended the rules relating to migrant workers' children by enlarging the range of benefits which migrant workers are entitled to claim. It entitles them to family benefits, that is to say, to 'all benefits in kind or in cash intended to meet family expenses' (Article 1 (u) (i)), whereas under Regulation No 3/58 they were entitled only to family allowances, namely 'periodical cash benefits granted exclusively by the reference to the number and, where appropriate, the age of members of the family' (Article 1 (u) (ii) of Regulation No 1408/71).

19 As regards a migrant worker employed in one Member State but whose family resides in another Member State, Regulation No 1408/71 introduced a distinction between workers employed in France and workers employed in other Member States. Article 73 (1) provides that a worker subject to the legislation of a Member State other than France is to be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State as though they were residing in the territory of the first State. Article 73 (2) provides that a worker subject to French legislation shall be entitled, in respect of members of his family residing in the territory of a Member State other than France, to the family allowances provided for by the legislation of the Member State in whose territory the members of the family reside.

20 As regards the difference in treatment between workers to whom Article 73 (1) applies and workers subject to the arrangements laid down in Article 73 (2), it must be observed that Article 51 of the Treaty provides for the coordination, not the harmonization, of the legislation of the Member States. As a result, Article 51

leaves in being differences between the Member States' social security systems and, consequently, in the rights of persons working in the Member States. It follows that substantive and procedural differences between the social security systems of individual Member States, and hence in the rights of persons working in the Member States, are unaffected by Article 51 of the Treaty.

21 Nevertheless, the achievement of the objective of securing free movement for workers within the Community, as provided for by Articles 48 to 51 of the Treaty, is facilitated if conditions of employment, including social security rules, are as similar as possible in the various Member States. That objective will, however, be imperilled and made more difficult to realize if unnecessary differences in the social security rules are introduced by Community law. It follows that the Community rules on social security introduced pursuant to Article 51 of the Treaty must refrain from adding to the disparities which already stem from the absence of harmonization of national legislation.

22 Article 73 of Regulation No 1408/71 creates two different systems for migrant workers depending on whether they are subject to French legislation or to the legislation of another Member State. Accordingly, it adds to the disparities caused by national legislation and, as a result, impedes the achievement of the aims set out in Articles 48 to 51 of the Treaty.

23 More specifically with regard to the assessment of the validity of Article 73 (2) itself, it must be stated that the principle of equal treatment prohibits not only overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result.

24 That is precisely the case when the criterion set out in Article 73 (2) is used in order to determine the legislation applicable to the family benefits of a migrant worker. Although as a general rule the French legislation employs the same criterion to determine the entitlement to family benefits of a French worker employed in French territory, that criterion is by no means equally important for that category of worker, since the problem of members of the family residing outside France arises essentially for migrant workers. Consequently, the criterion is not of such a nature as to secure the equal treatment laid down by Article 48 of

the Treaty and therefore may not be employed within the context of the coordination of national legislation which is laid down in Article 51 of the Treaty with a view to promoting the free movement of workers within the Community in accordance with Article 48.

25 It follows that Article 73 (2) of Regulation No 1408/71 is invalid in so far as it precludes the award to employed persons subject to French legislation of French family benefits for members of their family residing in the territory of another Member State.

26 As regards the consequences of the invalidity of Article 73 (2), it must be noted that in its judgment of 27 February 1985 in Case 112/83 (*Société des produits de maïs SA* v *Administration des douanes et droits indirects* [1985] ECR 732) the Court ruled that where it is justified by overriding considerations the second paragraph of Article 174 of the Treaty gives the Court discretion to decide, in each particular case, which specific effects of a regulation which has been declared void must be maintained.

27 Since the Council has not yet reached the uniform solution required by Article 98 of Regulation No 1408/71, account should be taken, exceptionally, of the fact that France has been induced to maintain for a long period practices which were consistent with Regulation No 1408/71 but which had no legal basis under Articles 48 and 51 of the Treaty.

28 In those circumstances it must be held that owing to overriding considerations of legal certainty involving all the interests at stake, public and private, the payment of family benefits for periods prior to the delivery of this judgment cannot, in principle, be called in question.

29 Accordingly, when the Court makes use of the possibility of limiting the effect on past events of a declaration in proceedings under Article 177 of the Treaty that a measure is invalid, it is for the Court to decide whether an exception to that temporal limitation of the effect of its judgment may be made in favour of the party which brought the action before the national court or in favour of any other person who took similar steps before the declaration of invalidity or whether, conversely, a declaration of invalidity applicable only to the future constitutes an

adequate remedy even for persons who took action at the appropriate time with a view to protecting their rights.

30 In this case, the appropriate determination is that, except as regards employed persons who have already brought legal proceedings or made an equivalent claim prior to the date of this judgment, the aforesaid invalidity of Article 73 (2) of Regulation No 1408/71 cannot be relied on in order to support claims regarding benefits for periods prior to that date.

31 In the circumstances there is no need to answer the second part of the first question, concerning the continued application of Article 73 (2) of Regulation No 1408/71, or the second question, concerning the interpretation of the word 'residence' in the context of Article 73 (2).

Costs

32 The costs incurred by the Government of the Hellenic Republic, the Government of the Italian Republic, the Government of the French Republic and the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the action 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 French Cour de cassation by an order of 11 January 1984, hereby rules:

(1) Article 73 (2) of Regulation No 1408/71 is invalid in so far as it precludes the award to employed persons subject to French legislation of French family benefits for members of their family residing in the territory of another Member State.

(2) Except as regards employed persons who have already brought legal proceedings or made an equivalent claim prior to the date of this judgment, the aforesaid invalidity of Article 73 (2) of Regulation No 1408/71 cannot be relied on in order to support claims to benefits for periods prior to that date.

Mackenzie Stuart Everling Bahlmann Joliet

Bosco Koopmans Due Galmot O'Higgins

Delivered in open court in Luxembourg on 15 January 1986.

P. Heim
Registrar

A. J. Mackenzie Stuart
President