

JUDGMENT OF THE COURT (Fifth Chamber)
30 January 1997 *

In Joined Cases C-4/95 and C-5/95,

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

Fritz Stöber (C-4/95) and

José Manuel Piosa Pereira (C-5/95)

and

Bundesanstalt für Arbeit

on the interpretation 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 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),

* Language of the case: German.

THE COURT (Fifth Chamber),

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

Advocate General: A. La Pergola,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

— the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, acting as Agent,

— the Spanish Government, by Alberto José Navarro González, Director General for Community Legal and Institutional Coordination, 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 seconded to its Legal Service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the German Government, represented by Sabine Maass, Regierungsrätin z. A. in the Federal Ministry of Economic Affairs,

acting as Agent; the Spanish Government, represented by Miguel Bravo-Ferrer Delgado; and the Commission, represented by Jürgen Grunwald, Legal Adviser, and Maria Patakia, acting as Agents, at the hearing on 28 March 1996,

after hearing the Opinion of the Advocate General at the sitting on 6 June 1996,

gives the following

Judgment

- 1 By two orders of 25 November 1994, received at the Court on 12 January 1995, the Landessozialgericht Nordrhein-Westfalen (North Rhine-Westphalia Higher Social Court) referred to the Court for a preliminary ruling questions on the interpretation of Article 1(a) 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 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; 'Regulation No 1408/71').

- 2 The questions arose in two sets of proceedings between Mr Stöber (C-4/95) and Mr Piosa Pereira (C-5/95), on the one hand, and Bundesanstalt für Arbeit, on the

other, in relation to the latter's refusal to take their children who are non-resident in Germany into account for the purposes of determining the amount of dependent children's allowances under German law.

- 3 By virtue of Paragraph 2(5) of the Bundeskindergeldgesetz (German Law on Allowances in respect of Dependent Children; 'the BKGG') of 25 June 1969, children who are not habitually or normally resident in Germany are not taken into account for the purposes of calculating family benefits.

- 4 In Case C-4/95, Mr Stöber, a German national, worked in Ireland until 1969, before settling in Germany where he paid contributions as an employed person to the compulsory sickness and old-age insurance schemes until 1977. Since 1 February 1977 he has worked in Germany as a self-employed person and paid voluntary contributions to the statutory old-age insurance scheme for employed persons and to a statutory complementary sickness insurance scheme.

- 5 In connection with the calculation of dependent children's allowances for his two children of a second marriage, Mr Stöber applied in November 1988 for his daughter of his first marriage, who lived in Ireland with her mother, to be taken into account. According to Mr Stöber, the daughter in question stays with him during her holidays. She is also registered with the police in Germany.

- 6 His application was rejected by decision of 22 December 1988, confirmed by decision of 13 February 1989, on the ground that the child in question was not habitually or normally resident in Germany within the meaning of the BKGG.

- 7 Having undertaken before the Sozialgericht (Social Court) Dortmund to review the application in the light of Community law, Bundesanstalt für Arbeit again rejected it by decision of 5 October 1990, which was confirmed on 8 April 1991. The German institution took the view that Mr Stöber was not a 'self-employed person' within the meaning of Regulation No 1408/71 and was therefore not entitled to rely on Article 73 of that regulation.
- 8 Under Article 73 of Regulation No 1408/71, as amended with effect from 15 January 1986, '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'.
- 9 Article 1(a) of Regulation No 1408/71 provides that, for the purpose of the regulation, "employed person" and "self-employed person" mean respectively:
- (i) any person who is insured, compulsorily or on an optional continued basis, for one or more of the contingencies covered by the branches of a social security scheme for employed or self-employed persons;

(ii) any person who is compulsorily insured for one or more of the contingencies covered by the branches of social security dealt with in this Regulation, under a social security scheme for all residents or for the whole working population, if such person:

— can be identified as an employed or self-employed person by virtue of the manner in which such scheme is administered or financed, or,

— failing such criteria, is insured for some other contingency specified in Annex I under a scheme for employed or self-employed persons, or under a scheme referred to in (iii), either compulsorily or on an optional continued basis, or, where no such scheme exists in the Member State concerned, complies with the definition given in Annex I;

...

(iv) any person who is voluntarily insured for one or more of the contingencies covered by the branches dealt with in this Regulation, under a social security

scheme of a Member State for employed or self-employed persons or for all residents or for certain categories of residents:

— if such person carries out an activity as an employed or self-employed person, or

— if such person has previously been compulsorily insured for the same contingency under a scheme for employed or self-employed persons of the same Member State;

...'

¹⁰ According to Annex I, point I — ‘Employed persons and/or self-employed persons [Article 1(a)(ii) and (iii) of the Regulation]’, C (‘Germany’) —, to Regulation No 1408/71,

‘If the competent institution for granting family benefits in accordance with Chapter 7 of Title III of the Regulation is a German institution, then within the meaning of Article 1(a)(ii) of the Regulation:

(a) “employed person” means any person compulsorily insured against unemployment or any person who, as a result of such insurance, obtains cash benefits under sickness insurance or comparable benefits;

(b) “self-employed person” means any person pursuing self-employment who is bound:

— to join, or pay contributions in respect of, an old-age insurance within a scheme for self-employed persons, or

— to join a scheme within the framework of compulsory pension insurance.’

11 The Sozialgericht Dortmund granted an appeal by Mr Stöber against the aforementioned decision of 8 April 1991 in respect of the period 1 May 1988 to 31 December 1991, when the person concerned finished her education. The Sozialgericht Dortmund took the view that Mr Stöber was a ‘self-employed person’ within the meaning of Article 1(a)(i) of Regulation No 1408/71 in so far as he was insured under a voluntary old-age insurance scheme. He was therefore entitled to rely on Article 73 of the regulation.

12 Bundesanstalt für Arbeit appealed against that decision to the court making the reference. Before that court it argued that the only determinative provisions in this case are the combined provisions of Article 1(a)(ii) and Annex I of Regulation No 1408/71, which defines the expression ‘self-employed person’ for the purposes of

Article 1(a)(ii) of the regulation where a German institution is the institution competent to grant family benefits under Title III, Chapter 7, of the regulation. Under point I, C, (b) of that annex, Mr Stöber does not come under Regulation No 1408/71 since he is not subject to compulsory insurance.

- 13 In Case C-5/95, Mr Piosa Pereira, a Spanish national, worked as an employed person in Spain and therefore was subject to the compulsory sickness and old-age insurance schemes until 9 September 1988. He has been self-employed in Germany since 1 April 1989 and has paid voluntary contributions to a local sickness insurance fund since 23 April 1989.
- 14 On 31 October 1989, Mr Piosa Pereira applied for dependent children's allowances in respect of his three children living in Spain with his wife from whom he is separated. On 7 August 1990 his application was rejected on the ground that he was not covered by Regulation No 1408/71 and that accordingly he could not rely on Article 73 of that regulation. That decision was confirmed on 10 September 1990.
- 15 Mr Piosa Pereira then appealed to the Sozialgericht Dortmund, which upheld his appeal on 24 September 1990 on the ground that he was entitled to rely on Article 73 of Regulation No 1408/71. In so far as Mr Piosa Pereira had subscribed for voluntary continued sickness insurance he was a person covered by the regulation by virtue of Article 1(a)(i) of Regulation No 1408/71. Annex I, for its part, was inapplicable in so far as it covered only the schemes referred to in Article 1(a)(ii) of the regulation.
- 16 On 12 November 1992 Bundesanstalt für Arbeit appealed against that decision to the court making the reference.

- 17 The national court observes that neither Mr Stöber nor Mr Piosa Pereira was entitled under the German legislation to dependent children's allowances in respect of their children residing abroad. Under the first sentence of Paragraph 2(5) of the BKGG, children not habitually or normally resident in Germany are not to be taken into account when calculating family benefits.
- 18 That court however raises the question whether, as self-employed persons, the appellants in the main proceedings may not base their claims on Article 73 of Regulation No 1408/71. In its view, they both satisfy the requirements in order to be regarded as 'self-employed persons' within the meaning of Regulation No 1408/71. Mr Stöber fulfils the conditions laid down by Article 1(a)(iv) of Regulation No 1408/71 as a self-employed person voluntarily insured against the risks of old age and sickness under a scheme for employed persons, to which he was previously compulsorily subject. As for Mr Piosa Pereira, he fulfils the conditions set out in Article 1(a)(i) and (iv) of Regulation No 1408/71 as a self-employed person who took out voluntary continued sickness insurance under a scheme for employed persons on the basis of previous periods of compulsory insurance.
- 19 The national court observes that, in contrast, Mr Stöber and Mr Piosa Pereira do not fulfil the conditions laid down by the combined provisions of the second indent of Article 1(a)(ii) and Annex I, point I, C, (b) of Regulation No 1408/71. Whilst the German legislation on dependent children's allowances is a scheme for the 'family benefits' branch [Article 4(1)(h) of Regulation No 1408/71], which applies to all residents and whose manner of administration does not allow any distinction to be made between employed persons and self-employed persons, the appellants in the main proceedings do not satisfy the criteria set out in Annex I, point I, C, (b) to which the second indent of Article 1(a)(ii) refers, inasmuch as they are insured only voluntarily.

20 In these circumstances, the national court considers that if Article 1(a)(ii) is to be regarded as defining the concept of a 'self-employed person' restrictively in relation to the German rules on family benefits, the appellants in the main proceedings could not rely on Article 73 of the regulation.

21 The national court points out that, according to German case-law and learned writings, only Article 1(a)(ii) is in point where the institution competent to grant family benefits is German. In its view, the specific conditions laid down in Annex I suggest that that provision should apply as a *lex specialis* with respect to the German legislation on family benefits. The national court observes that that interpretation presupposes that points (i) to (iv) of Article 1(a) are applicable, specifically, to particular risks and schemes. That view is supported by the structure of Regulation No 1408/71, since any other interpretation would make the definition set out in Annex I, point I, C otiose.

22 The national court adds that in Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755 the Court nevertheless held that the expression 'employed person' means any person who is insured under one of the social security schemes referred to in Article 1(a) for the contingencies and on the conditions mentioned in that provision. According to the national court, those words suggest that affiliation to any of the schemes referred to in Article 1(a) makes the person affiliated a worker entitled to rely on the various provisions of Regulation No 1408/71.

- 23 Hesitating between those two views, the national court decided to stay proceedings and refer the following questions to the Court:

Case C-4/95:

‘For the purposes of the payment of family benefits in the Federal Republic of Germany, is a person who carries on an activity as a self-employed person in the Federal Republic of Germany and as such satisfies the definition of a “self-employed person” within the meaning of Article 1(a)(iv) but not the definition contained in the first sub-alternative in the second indent of Article 1(a)(ii) in conjunction with point I, C, (b) of Annex I a “self-employed person” within the meaning of Article 73 of Regulation (EEC) No 1408/71?’

In Case C-5/95:

‘For the purposes of the payment of family benefits in the Federal Republic of Germany, does the term “self-employed person” within the meaning of Article 73 of Regulation (EEC) No 1408/71 cover a person who carries on an activity as a self-employed person in the Federal Republic of Germany and as such satisfies the definition of a “self-employed person” within the meaning of Article 1(a)(i) and (iv) but not the definition contained in the first sub-alternative in the second indent of Article 1(a)(ii) in conjunction with point I, C, (b) of Annex I?’

- 24 By those questions, the national court essentially seeks to establish whether, for the purposes of the payment of family benefits under the German legislation, Article 73 of Regulation No 1408/71 must be interpreted as covering only self-employed persons complying with the definition resulting from Article 1(a)(ii) in conjunction with Annex I, point I, C, (b) of that regulation.

- 25 According to Article 73 of Regulation No 1408/71, as amended by Regulation No 3427/89 with effect from 15 January 1986, a 'self-employed person' subject to the legislation of a Member State is entitled, in respect of 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.
- 26 The persons covered by Regulation No 1408/71 are defined by Article 2. According to Article 2(1), Regulation No 1408/71 applies, *inter alia*, to 'employed or self-employed persons who are or have been subject to the legislation of one or more Member States'.
- 27 The expression 'self-employed persons' used in that provision is defined by Article 1(a) of Regulation No 1408/71. It means any person who is insured under one of the social security schemes referred to in Article 1(a) for the contingencies and on the conditions mentioned in that provision (*Kits van Heijningen*, paragraph 9).
- 28 Persons in the situation of the appellants in the main proceedings come within the definition of 'self-employed person', in particular within the meaning of Article 1(a)(iv) of Regulation No 1408/71, in so far as they are voluntarily insured against sickness or old age — branches of social security to which Regulation No 1408/71 applies — under a social security scheme organized for the benefit of workers and in so far as, in particular, they are self-employed.

29 However, according to the terms of Annex I, point I, C, (b), to which Article 1(a)(ii) of Regulation No 1408/71 refers, only workers compulsorily insured under one of the schemes mentioned therein are entitled to German family benefits in accordance with Chapter 7 of Title III of Regulation No 1408/71.

30 Admittedly, as the Court has held (see, in particular, Case 300/84 *Van Roosmalen* [1986] ECR 3097, paragraphs 18 and 20), the expression 'self-employed person' within the meaning of Regulation No 1408/71 must be interpreted broadly, having regard to its objective of contributing towards the establishment of the greatest possible freedom of movement for migrant workers, a principle which is one of the foundations of the Community.

31 However, as the German Government has rightly observed, in so far as Regulation No 3427/89 included self-employed persons among the persons covered by Article 73 of Regulation No 1408/71, the Community legislator was itself entitled to determine which of them it intended to qualify to benefit under its provisions. Accordingly, as far as German family benefits are concerned, the Community legislator chose as its criterion compulsory old-age insurance under a scheme for self-employed persons or within the framework of compulsory old-age insurance.

32 If a worker in a situation of the kind before the national court were allowed to rely on one of the other definitions of 'self-employed person' set out in Article 1(a) in order to qualify for German social security benefits, that would be tantamount to depriving the provision in the annex of all effectiveness.

- 33 As the Advocate General observed in point 32 of his Opinion, it is not possible to reject that conclusion on the basis of the judgment in *Kits van Heijningen*, in which the Court merely clarified the scope of Regulation No 1408/71, as defined in Article 2, without seeking to resolve the problems connected with the various definitions set out in Article 1(a) of the regulation.
- 34 Consequently, where the competent institution for the payment of family benefits is German, the notion of self-employed person within the meaning of Article 73 of Regulation No 1408/71 must be interpreted as referring only to persons satisfying the specific conditions set forth in the second indent of Article 1(a)(ii) and point I, C, (b) of Annex I, the definitions set out in Article 1(a)(i) and (iv) being applicable as appropriate to the other contingencies against which the worker is voluntarily insured.
- 35 Under the aforementioned provision of Annex I, whether a person has the capacity of a self-employed person depends, *inter alia*, on whether he is affiliated to an old-age insurance scheme. In the case of self-employed persons, it is permissible under German law for them to join such a scheme within a specified period of their commencing self-employment.
- 36 In this connection, it should be noted that there is nothing to prevent Member States from restricting entitlement to family benefits to persons belonging to a solidarity system constituted by an old-age insurance scheme. The Member States are at liberty to determine the conditions for entitlement to social security benefits, since Regulation No 1408/71 merely plays a coordinating role.

- 37 However, the BKGG grants family benefits to any person habitually or normally resident in the territory to which that law applies, where his dependent children are habitually or normally resident in that territory.
- 38 Accordingly, that law treats nationals who have not exercised their right to free movement and migrant workers differently, to the detriment of the latter, since it is primarily the latter's children who do not reside in the territory of the Member State granting the benefits in question.
- 39 In so far as the case-files contain no material capable of providing objective justification for that difference in treatment, it must be regarded as discriminatory and hence as incompatible with Article 52 of the Treaty.
- 40 It should be specified in this connection that, unlike in Case C-15/90 *Middleburgh* [1991] ECR I-4655, paragraphs 14 and 15, the rules which, as regards freedom of establishment, are essential for the purpose, in particular of ensuring that benefits are in fact used for the upkeep of dependent children and avoiding overlapping payments, have been adopted by the Community legislator as regards the periods in question. In cases such as those before the national court, therefore, the national authorities must apply by analogy such of those rules as are applicable to self-employed persons coming within the scope of Regulation No 1408/71.

41 The answer to the national court's questions must therefore be that, for the purposes of the payment of family benefits under German legislation, Article 73 of Regulation No 1408/71 must be interpreted as covering only self-employed persons complying with the definition provided by the combined provisions of Article 1(a)(ii) and point I, C, (b) of Annex I of that regulation. However, national rules which cause the taking of a self-employed person's children into account when calculating family benefits to be dependent upon their residing in that Member State are contrary to Article 52 of the Treaty.

Costs

42 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 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 25 November 1994, hereby rules:

For the purposes of the payment of family benefits under German legislation, Article 73 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 Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EEC) No 3427/89 of 30 October 1989, must be interpreted as covering only self-employed persons complying with the definition provided by the combined provisions of Article 1(a)(ii) and point I, C, (b) of Annex I of that regulation. However, national rules which cause the taking of a self-employed person's children into account when calculating family allowances to be dependent upon their residing in that Member State are contrary to Article 52 of the EC Treaty.

Moitinho de Almeida

Gulmann

Edward

Puissochet

Jann

Delivered in open court in Luxembourg on 30 January 1997.

R. Grass

J. C. Moitinho de Almeida

Registrar

President of the Fifth Chamber