

21 February 2008 (*)

(Entitlement to childcare allowance in Austria – Periods of drawing family benefits in another Member State not taken into account – Regulation (EEC) No 1408/71)

In Case C-507/06,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberlandesgericht Innsbruck (Austria), made by decision of 30 November 2006, received at the Court on 13 December 2006, in the proceedings

Malina Klöppel

v

Tiroler Gebietskrankenkasse,

THE COURT (Second Chamber),

composed of C.W.A. Timmermans, President of the Chamber, L. Bay Larsen, K. Schiemann (Rapporteur), P. Kūris and C. Toader, Judges,

Advocate General: P. Mengozzi,

Registrar: R. Grass,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- Ms Klöppel, by D. Rief,
- the Tiroler Gebietskrankenkasse, by A. Bramböck, acting as Agent,
- the Austrian Government, by C. Pesendorfer, acting as Agent,
- the Italian Government, by I.M. Braguglia, acting as Agent, assisted by W. Ferrante, avvocato dello Stato,
- the Commission of the European Communities, by V. Kreuzsitz, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Articles 3 and 72 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 (EC) No 118/97 of 2 December 1996 (OJ 1997 L 28, p. 1), as amended in turn by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 (OJ 2001 L 187, p. 1) ('Regulation No 1408/71'), as well as of Article 10a 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 Regulation No 118/97, as amended in turn by Commission Regulation (EC) No 410/2002 of 27 February 2002 (OJ 2002 L 62, p. 17) ('Regulation No 574/72').
- 2 The reference has been made in the course of proceedings between Ms Klöppel and the Tiroler Gebietskrankenkasse (Tyrol Regional Health Insurance Fund) concerning the duration of the period during which Ms Klöppel is entitled to receive childcare allowance in Austria.

Legal context

Community law

3 As set out in Article 3 of Regulation No 1408/71, headed 'Equality of treatment':

'1. Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.

...'

4 Article 4 of Regulation No 1408/71, headed 'Matters covered', provides:

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

...

(h) family benefits.

...'

5 Article 72 of Regulation No 1408/71, headed 'Aggregation of periods of insurance, employment or self-employment', provides:

'Where the legislation of a Member State makes acquisition of the right to benefits conditional upon completion of periods of insurance, employment or self-employment, the competent institution of that State shall take into account for this purpose, to the extent necessary, periods of insurance, employment or self-employment completed in any other Member State, as if they were periods completed under the legislation which it administers.'

6 Under Article 10a of Regulation No 574/72, headed 'Rules applicable where an employed or self-employed person is subject successively to the legislation of several Member States during the same period or part of a period':

'Where an employed or self-employed person has been subject successively to the legislation of two Member States during the period separating two dates for the payment of family benefits as provided for by the legislation of one or both of the Member States concerned, the following rules shall apply:

(a) the family benefits which the person concerned may claim by virtue of being subject to the legislation of each one of these States shall correspond to the number of daily benefits due under the relevant legislation. Where such legislation does not provide for daily benefits, the family benefits shall be granted in proportion to the length of time during which the person concerned has been subject to the legislation of each one of the Member States in relation to the period fixed by the legislation concerned;

(b) where the family benefits have been provided by an institution during a period when they should have been provided by another institution, there shall be an adjustment of accounts between the said institutions;

...'

Austrian law

7 Paragraph 5 of the Law on childcare allowance (Kinderbetreuungsgeldgesetz) of 8 August 2001 (BGBl. I 103/2001, the 'KBGG') provides:

'1. Childcare allowance shall be paid at the most until the child reaches the age of 36 months unless otherwise provided below.

2. If only one parent claims childcare allowance it shall be paid at the most until the child reaches the age of 30 months. If the second parent also claims childcare allowance then the duration of entitlement is extended beyond the age of 30 months for such period as the second parent claims childcare allowance, but not later than the date on which the child reaches the age of 36 months.

3. Both parents may take it in turns to draw childcare allowance, in the course of which two changes per child are permitted. ...'

The dispute in the main proceedings and the question referred for a preliminary ruling

8 Ms Klöppel, a German national and a civil servant of the Land of North Rhine-Westphalia, is resident in Austria and is employed as a teacher at a grammar school in Germany. Until 18 August 2004, she was resident in Germany, where, on 11 April 2004, her daughter was born. Mr Kraler, an Austrian national and Ms Klöppel's partner and father of that child, came to live at the home of Ms Klöppel from 1 March 2004 onwards, in order to help her in the period before the birth of the child and to care for the child after her birth. For that purpose, Mr Kraler's employer, the University of Innsbruck, granted him unpaid leave. Ms Klöppel, for her part, was granted unpaid full-time leave from 22 July 2004 until 10 April 2007.

9 Following the birth of their daughter, Ms Klöppel and Mr Kraler, who were at that time residing in Germany, received the child-raising allowance paid in that State, with the allowance actually having been drawn by Mr Kraler, for the period from 11 April 2004 to 11 August 2004.

10 On 18 August 2004, Ms Klöppel and Mr Kraler, together with their child, established themselves in Austria, where Mr Kraler resumed his professional activity.

11 From that date onwards until 11 October 2006, Ms Klöppel received childcare allowance in Austria. Her application for payment of that allowance to be extended until 10 April 2007 was rejected by a decision of the Tiroler Gebietskrankenkasse of 3 May 2006. That refusal was based on Paragraph 5(2) of the KBGG, which provides that, where only one parent claims childcare allowance, it is to be paid for a maximum of 30 months following the birth of the child concerned, but that if the second parent also claims (or has claimed) childcare allowance, the right to that allowance can be granted for 36 months, with both parents taking it in turns to draw that allowance. However, Mr Kraler's drawing of the child-raising allowance in Germany between 11 April 2004 and 11 August 2004 was not taken into account when Ms Klöppel's entitlement to childcare allowance for a period of 36 months was being examined.

12 Ms Klöppel appealed against that decision.

13 The Landesgericht Innsbruck followed the reasoning of the Tiroler Gebietskrankenkasse and dismissed Ms Klöppel's appeal by holding that the latter was entitled to receive the childcare allowance for a period of 30 months only.

14 Ms Klöppel appealed against that decision; it is in those circumstances that the Oberlandesgericht (Higher Regional Court) Innsbruck decided to stay proceedings and to refer to the Court of Justice the following question for a preliminary ruling:

'Must Article 72 of Regulation ... No 1408/71 ..., in conjunction with Article 3 of that regulation and Article 10a of Regulation ... No 574/72 ..., be interpreted to the effect that periods of drawing family benefits in one Member State (in this case the national child-raising allowance in the Federal Republic of Germany (Bundeserziehungsgeld)) must be treated equally for the purposes of founding an entitlement to draw a comparable benefit in another Member State (in this case childcare allowance in Austria (Kinderbetreuungsgeld)) and, accordingly, must be treated in the same way as domestic periods of drawing for the purposes of entitlement in that second Member State, if, during those periods of drawing, both parents are to be regarded as employed persons under Article 1(a)(i) of Regulation No 1408/71?'

The question referred for a preliminary ruling

15 The Oberlandesgericht Innsbruck observes that, in Ms Klöppel's case, the reference periods which are taken into consideration as a precondition to entitlement to childcare allowance are assessed differently depending on whether they were completed in Austria or in another Member State. Accordingly, if Mr Kraler had cared for his child in Austria and had, on that basis, drawn childcare allowance in that Member State, Ms Klöppel would have a right to claim that allowance for a longer period. It is in this context, and after having found that Ms Klöppel's case falls within the scope of Regulation No 1408/71, that the Oberlandesgericht Innsbruck asks whether the provisions of that regulation may be interpreted to the effect that periods of drawing family allowances in Germany must be treated in the same way as periods during which comparable allowances are drawn in Austria.

16 In this respect, first of all, it must be observed – as the Austrian Government submits – that Community law does not limit the power of the Member States to organise their social security schemes and that, in the

absence of harmonisation at Community level, it is for the legislation of each Member State to lay down the conditions under which social security benefits are granted, as well as the amount of such benefits and the period for which they are granted. However, when exercising that power, the Member States must comply with Community law and, in particular, the EC Treaty provisions on freedom of movement for workers or again the freedom of every citizen of the European Union to move and reside in the territory of the Member States (Case C-135/99 *Elsen* [2000] ECR I-10409, paragraph 33).

- 17 The principle of non-discrimination, as laid down in Article 39(2) EC and implemented, as far as concerns social security for migrant workers, by Article 3(1) of Regulation No 1408/71, prohibits not only overt discrimination based on the nationality of the beneficiaries of social security schemes but also all covert forms of discrimination which, through the application of other distinguishing criteria, lead in fact to the same result (see Case C-332/05 *Celozzi* [2007] ECR I-563, paragraphs 13 and 23).
- 18 Accordingly, conditions imposed by national law must be regarded as indirectly discriminatory where, although applicable irrespective of nationality, they affect essentially migrant workers or the great majority of those affected are migrant workers, where they are applicable without distinction but can more easily be satisfied by national workers than by migrant workers, or where there is a risk that they may operate to the particular detriment of the latter (*Celozzi*, paragraph 24).
- 19 The refusal to take into account, for the purposes of granting Ms Klöppel the Austrian childcare allowance, the period during which her partner, Mr Kraler, received a comparable benefit in Germany is likely to lead to such a result, given that, as a general rule, it is workers who are nationals of other Member States who, prior to their establishment in Austria, would have received family benefits paid in those other States.
- 20 It should be noted that the Court does not possess the information that would allow it to examine a possible justification for such a difference in treatment to the detriment of migrant workers.
- 21 Given that the interpretation of Article 3 of Regulation No 1408/71 on its own suffices to provide the Oberlandesgericht Innsbruck with the necessary information to allow it to resolve the dispute before it, it is not necessary for the Court to proceed to an interpretation of Article 72 of Regulation No 1408/71 and Article 10a of Regulation No 574/72.
- 22 In the light of the foregoing, the answer to the question referred must be that Article 3(1) of Regulation No 1408/71 precludes a Member State from refusing to take into account, for the purposes of granting a family benefit such as the Austrian childcare allowance, the period during which a comparable benefit was drawn in another Member State as if that period had been completed in its own territory.

Costs

- 23 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 (Second Chamber) hereby rules:

Article 3(1) 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 (EC) No 118/97 of 2 December 1996, as amended in turn by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001, precludes a Member State from refusing to take into account, for the purposes of granting a family benefit such as the Austrian childcare allowance, the period during which a comparable benefit was drawn in another Member State as if that period had been completed in its own territory.

[Signatures]