
The reference was made in the course of proceedings between Mrs Bosmann and the Bundesagentur für Arbeit – Familienkasse Aachen (Federal Employment Agency – Aachen Family Benefits Office, ‘the Bundesagentur’) concerning a refusal to grant child benefits in Germany.
Legal context

Community legislation

Regulation No 1408/71

The first and fifth recitals in the preamble to Regulation No 1408/71 read as follows:

‘Whereas the provisions for coordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should contribute towards the improvement of their standard of living and conditions of employment;

...’

Whereas it is necessary, within the framework of that coordination, to guarantee within the Community equality of treatment under the various national legislations to workers living in the Member States and their dependants and their survivors’.

The 8th to 10th recitals in the preamble to Regulation No 1408/71 state:

‘Whereas employed persons and self-employed persons moving within the Community should be subject to the social security scheme of only one single Member State in order to avoid overlapping of national legislations applicable and the complications which could result therefrom;

Whereas the instances in which a person should be subject simultaneously to the legislation of two Member States as an exception to the general rule should be as limited in number and scope as possible;

Whereas with a view to guaranteeing the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues employment or self-employment’.

Article 13 of Regulation No 1408/71, entitled ‘General rules’, provides:

‘1. Subject to Articles 14c and 14f, 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. Subject to Articles 14 to 17:

(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 or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State;

...’

Under Article 73 of Regulation No 1408/71, entitled ‘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, subject to the provisions of Annex VI.’

Regulation No 574/72

Article 10(1) of Regulation No 574/72, entitled ‘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 … Regulation [No 1408/71], up to the sum of those benefits.'
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 … Regulation [No 1408/71] 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

Paragraph 62.1.1 of the Law on Income Tax (Einkommensteuergesetz) provides:

'In respect of children ... a person shall be entitled to child benefit under this law if he has a residence in Germany or normally resides there.'

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

Mrs Bosmann, a Belgian national resident in Germany, is bringing up her two children, born respectively in 1983 and 1985, on her own. They also reside Germany where they are students.

In principle, Mrs Bosmann is, under Paragraph 62 of the Law on Income Tax, entitled to German child benefits which were, initially, granted by the Bundesagentur. However, after Mrs Bosmann took up, on 1 September 2005, employment in the Netherlands, she was, by a decision of 18 October 2005, refused payment of those benefits from October 2005. The Bundesagentur construed the relevant provisions of Community law as meaning that Mrs Bosmann is subject only to the legislation of the Member State of employment, namely that of the Kingdom of the Netherlands, so that the Federal Republic of Germany cannot be regarded as the competent State, liable to pay those benefits.

Mrs Bosmann cannot be entitled to the corresponding child benefits in the Netherlands in view of the fact that its legislation does not provide for them to be granted for children aged over 18.

The national court states that it has not been clarified whether Mrs Bosmann returns to Germany at the end of each working day or only on week-ends and other public holidays.

It was in those circumstances that the Finanzgericht Köln (Finance Court, Cologne) decided to stay proceedings and to refer to the Court the following questions for a preliminary ruling:

1. Is Article 13(2)(a) of … Regulation … No 1408/71 … to be interpreted restrictively, so as not to [preclude] entitlement to child benefit of a mother bringing up children on her own in the State of residence (the Federal Republic of Germany), who does not receive child benefit in the State of employment (the Kingdom of the Netherlands) because of the age of the children?

2. If Question 1 is answered in the negative:

Is Article 10 of … Regulation … No 574/72 … to be interpreted restrictively, so as not to [preclude] entitlement to child benefit of a mother bringing up children on her own in the State of residence (Federal Republic of Germany), who does not receive child benefit in the State of employment (Kingdom of the Netherlands) because of the age of the children?

3. If the answer to Question 1 and Question 2 is in the negative:

Does a mother in employment, who brings up children on her own, have a right to the application of the more favourable rules of her State of residence in relation to the granting of child benefit arising directly from the EC Treaty and/or from general legal principles?

4. Is it relevant to the answers to the above questions whether the employee returns to the family residence at the end of each working day?'
The first question

By its first question, the national court is asking whether Article 13(2)(a) of Regulation No 1408/71 lends itself to an interpretation which permits an employed person in Mrs Bosmann’s situation, who comes within the scope of Regulation No 1408/71 and is subject to the social security scheme of the Member State of her employment, in this case the Kingdom of the Netherlands, to receive child benefit in the Member State where she resides, in this case the Federal Republic of Germany, if it is established that she cannot, because of the ages of her children, be granted such a benefit in the competent Member State.

Before replying to that question, it is appropriate to note the general rules to which, under Regulation No 1408/71, the determination of the legislation applicable to workers moving within the Community is subject.

The aim of the provisions of Title II of Regulation No 1408/71, which determine the legislation applicable to workers moving within the Community, is to ensure that the persons concerned shall be subject to the social security scheme of only one Member State in order to prevent more than one system of national legislation from being applicable and to avoid complications which may result from that situation. That principle is expressed in Article 13(1) of Regulation No 1408/71 which provides that a worker to whom that legislation applies shall be subject to the legislation of a single Member State only (see Case 302/84 Ten Holder [1986] ECR 1821, paragraphs 19 and 20).

Under Article 13(2)(a) of Regulation No 1408/71, a person employed in the territory of one Member State is to be subject to the legislation of that State even if he resides in the territory of another Member State. The effect of determining that a given Member State’s legislation is the legislation applicable to a worker pursuant to that provision is that only the legislation of that Member State is applicable to him (see Ten Holder, paragraph 23).

As regards the specific context of family benefits, under Article 73 of Regulation No 1408/71 a person subject to the legislation of a Member State is to 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.

Consequently, as the national court has correctly held, the legislation applicable to Mrs Bosmann’s situation is, in principle, the legislation of the Member State of her employment, that is the Netherlands legislation.

Since the law applicable to the situation of an employed person in one of the situations covered by the provisions of Title II of Regulation No 1408/71 is to be determined in accordance with those provisions, the application of provisions from another system of legislation is not thereby always precluded (see Case C-302/02 Laurin Effing [2005] ECR I-553, paragraph 39).

In the submission of Commission of the European Communities, in a situation such as Mrs Bosmann’s, it is on the basis of Article 10(1)(a) of Regulation No 574/72 that the application of provisions of the system of legislation of the Member State of employment, designated, under Article 13(2)(a) of Regulation No 1408/71, as the competent State, may be disregarded to allow for the application of the legislation of the relevant person’s Member State of residence. Thus, the existence of a link of attachment to two Member States, namely that of residence and that of employment, permits, in particular, the overlapping of rights to benefits. Therefore, under Article 10(1)(a) of Regulation No 574/72, in view of the lack of comparable entitlement to family benefits in the Member State of employment, they should be granted without limitation by the Member State of residence, in this case the Federal Republic of Germany. In support of that argument, the Commission cites Case C-119/91 McMenamin [1992] ECR I-6393. From the same point of view, the national court refers to Case C-543/02 Dodl and Oberhollenzer [2005] ECR I-5049.

It must be emphasised, in that regard, that the cases which gave rise to the two above-cited judgments were decided on the basis of Article 10(1)(b)(i) of Regulation No 574/72, which covers situations in which a professional or trade activity is also carried out in the Member State of residence. As the Advocate General pointed out in points 51 and 52 of his Opinion, in McMenamin and Dodland Oberhollenzer the reversal of priorities in favour of the competence of the Member State of residence was triggered by the fact that a professional or trade activity was exercised or pursued in the Member State of residence by the spouse of the person entitled to the benefits in pursuance of Article 73 of Regulation No 1408/71.

However, it is clear from the decision making the reference that Mrs Bosmann is not in such a situation.

As regards Article 10(1)(a) of Regulation No 574/72, it is clear from its wording that it is intended to resolve cases of overlapping of rights to family benefits where they are due, simultaneously, irrespective of conditions of insurance or employment, in the relevant child’s Member State of residence and, in application of Article 73 of Regulation No 1408/71, in the Member State of employment.
However, as the German Government and the national court observe, the facts of the case in the main proceedings do not establish that type of ‘overlapping’ of family benefits, since the right to child benefit in the Member State of employment is, in this case, excluded, pursuant to that State’s legislation, in view of the ages of the children of the applicant in the main proceedings.

Since the reversal of priorities in favour of applying the legislation of the Member State of residence cannot be based on the specific rules of attachment stated in Regulation No 574/72, it must be noted that Mrs Bosmann’s situation is subject to the general rule for determining the legislation applicable set out in Article 13(2)(a) of Regulation No 1408/71.

It follows that Community law does not require the competent German authorities to grant Mrs Bosmann the family benefit in question.

However, neither can the possibility of such a grant be excluded, because, as is clear from the contents of the file submitted to the Court, it is apparent that, under the German legislation, Mrs Bosmann may be entitled to child benefit solely because of her residence in Germany, which is for the national court to determine.

In that context, it is appropriate to note that the provisions of Regulation No 1408/71 must be interpreted in the light of Article 42 EC which aims to facilitate freedom of movement for workers and entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty (see Case C-205/05 Nemec [2006] ECR I-10745, paragraphs 37 and 38).

Likewise, the first recital in the preamble to Regulation No 1408/71 states that the provisions which that regulation contains for coordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should contribute towards the improvement of their standard of living and conditions of employment.

In the light of those factors, it must be held that, in circumstances such as those of the main proceedings, the Member State of residence cannot be deprived of the right to grant child benefit to those resident within its territory. While, under Article 13(2)(a) of Regulation No 1408/71, a person employed in the territory of one Member State is to be subject to the legislation of that State even if he resides in the territory of another Member State, the fact remains that the purpose of that regulation is not to prevent the Member State of residence from granting, pursuant to its legislation, child benefit to that person.

Ten Holder, to which the German Government referred in its written observations, and Case 60/85 Luijten [1986] ECR 2365, referred to by the national court, cannot put in question the foregoing interpretation of Regulation No 1408/71. Ten Holder covered a case of refusal by the competent Member State’s authorities to grant a benefit and, in that context, the Court held that the effect of determining, pursuant to Regulation No 1408/71, that a given Member State’s legislation is the legislation applicable to a worker is that only that legislation is applicable to him (Ten Holder, paragraph 23). That principle was reiterated by the Court in Luijten, having regard to the likelihood of the simultaneous application of the legislation of the State of employment and of that of the State of residence permitting those covered to receive child benefit. Consequently, read in their specific contexts, which differ from that of the main proceedings, those judgments cannot serve as a basis for precluding a Member State, which is not the competent State but which does not subject the right to child benefit to conditions of employment or insurance, from being able to grant such a benefit to one of its residents, since the possibility of such a grant arises, in actual fact, from its legislation.

Having regard to the foregoing considerations, the answer to the first question must be that Article 13(2)(a) of Regulation No 1408/71 does not preclude a migrant worker, who is subject to the social security scheme of the Member State of employment, from receiving, pursuant to the national legislation of the Member State of residence, child benefit in the latter State.

The second and third questions

Having regard to the answer given to the first question, there is no need to reply to the second and third questions.

The fourth question

The national court is also asking whether the fact, if it be so, that Mrs Bosmann returns to the family residence in Germany at the end of each working day affects the answer to the first to third questions.

As is clear, in essence, from the answer to the first question, Article 13(2)(a) of Regulation No 1408/71 does
not preclude a migrant worker in Mrs Bosmann’s situation from receiving child benefit in the Member State of residence, provided that he or she satisfies the requirements for the grant of such benefit pursuant to the legislation of that State. Since, as is clear from the decision making the reference, Mrs Bosmann’s entitlement to child benefit in Germany is subject to the requirement that the relevant person resides in that Member State, a requirement which she seems, actually, to satisfy, it is for the referring court to determine whether Mrs Bosmann’s return to the family residence in Germany at the end of each working day is relevant for the purposes of deciding whether she ‘resides’, within the meaning of the German legislation, in that State.

Accordingly, the reply to the fourth question must be that it is for the referring court to determine whether the fact that a worker, in the situation of the applicant in the main proceedings, returns at the end of each working day to the family residence in the Member State concerned is relevant for the purposes of deciding whether such a worker satisfies the requirements for the grant of the child benefit in question in that State pursuant to its legislation.

Costs

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:


2. It is for the referring court to determine whether the fact that a worker, in the situation of the applicant in the main proceedings, returns at the end of each working day to the family residence in the Member State concerned is relevant for the purposes of deciding whether such a worker satisfies the requirements for the grant of the child benefit in question in that State pursuant to its legislation.

[Signatures]

* Language of the case: German.