Judgment of the Court (Fifth Chamber) of 7 February 2002

Liselotte Kauer v Pensionsversicherungsanstalt der Angestellten

Reference for a preliminary ruling: Oberster Gerichtshof – Austria

Social security for migrant workers - Regulation (EEC) No 1408/71 - Articles 94(1), (2) and (3) - Old-age insurance - Periods of child-rearing completed in another Member State before the entry into force of Regulation No 1408/71

Case C-28/00

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In Case C-28/00,

REFERENCE to the Court under Article 234 EC by the Oberster Gerichtshof (Austria) for a preliminary ruling in the proceedings pending before that court between

Liselotte Kauer

and

Pensionsversicherungsanstalt der Angestellten,

on the interpretation of Article 94(1), (2) and (3) 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),

THE COURT (Fifth Chamber),

composed of: S. von Bahr, President of the Fourth Chamber, acting for the President of the Fifth Chamber, D.A.O. Edward, A. La Pergola, L. Sevón and M. Wathelet (Rapporteur), Judges,

Advocate General: F.G. Jacobs,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Austrian Government, by C. Pesendorfer, acting as Agent,

- the Spanish Government, by N. Díaz Abad, acting as Agent,

- the Commission of the European Communities, by P. Hillenkamp and W. Bogensberger, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Liselotte Kauer, represented by U. Schubert, Rechtsanwalt, of the Austrian Government, represented by C. Pesendorfer, and of the Commission, represented by W. Bogensberger, at the hearing on 28 June 2001,

after hearing the Opinion of the Advocate General at the sitting on 25 September 2001,

gives the following

Judgment

Grounds

1 By order of 14 December 1999, received at the Court on 1 February 2000, the Oberster Gerichtshof (Supreme Court) (Austria) referred to the Court for a preliminary ruling under Article 234 EC a question on the interpretation of Article 94(1), (2) and (3) 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).

2 That question has been raised in proceedings between Liselotte Kauer and the Pensionsversicherungsanstalt der Angestellten (Salaried Employees' Pension Insurance Institution) concerning the determination of the periods of insurance to be taken into account for the calculation of a pension.

Law applicable

Community provisions

3 Regulation No 1408/71 was made applicable on 1 January 1994 to the Republic of Austria by the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3, hereinafter the EEA Agreement). As from 1 January 1995, it applied to the Republic of Austria as a Member State of the European Union.

4 Article 1(r) to (sa) of Regulation No 1408/71 contains the following definitions:

...

(r) periods of insurance means periods of contribution or period[s] of employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance;

(s) periods of employment and periods of self-employment mean periods so defined or recognised by the legislation under which they were completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of employment or of self-employment;

(sa) periods of residence means periods as defined or recognised as such by the legislation under which they were completed or considered as completed.

5 Article 94(1), (2) and (3) of Regulation No 1408/71 provides:

1. No right shall be acquired under this Regulation in respect of a period prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned ...

2. All periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before 1 October 1972 or before the date of its application in the territory of that Member State ... shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation.

3. Subject to the provisions of paragraph 1, a right shall be acquired under this Regulation even though it relates to a contingency which materialised prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned ...

The Austrian provisions

6 Paragraph 227a of the Allgemeines Sozialversicherungsgesetz (General Law on Social Security, in the version published in BGBl. 1997, p. 47, hereinafter the ASVG), which concerns substitute qualifying periods spent in rearing children, provides:

1. In addition, where an ... insured person has actually been the person mainly responsible for rearing ... her child ... , such child-rearing in the country, up to a maximum of 48 calendar months from the birth of the child, shall constitute a substitute qualifying period after 31 December 1955 in the class of pension insurance within which the last preceding contribution period falls or, where no such period exists, within which the next following contribution period falls.

...

3. Where the birth ... of an additional child occurs before the expiry of the 48-calendar-month period, it shall extend only until that additional birth ... Where the rearing of the additional child ... ends before that 48-calendar-month period, the following calendar months shall be counted again until it expires. Child-rearing in a State party to the Agreement on the European Economic Area (EEA) shall be treated as child-rearing in Austria where an entitlement to a cash benefit stemming from maternity insurance under this or another federal law or to a maternity benefit under the Betriebshilfegesetz exists, or existed, in respect of that child and the period of child-rearing occurs after that Agreement entered into force.

The main proceedings and question referred for a preliminary ruling

7 Liselotte Kauer, an Austrian national, has three children, born in 1966, 1967 and 1969. After completing her studies in June 1960, she worked in Austria from July 1960 to August 1964. In April 1970, together with her family, she transferred her residence to Belgium, where she did not work. After returning to Austria, she resumed working and completed compulsory periods of insurance as from September 1975.

8 At Mrs Kauer's request, the Pensionsversicherungsanstalt der Angestellten, by decision of 6 April 1998, recognised that, on 1 April 1998, she had accumulated 355 months of old-age insurance under Austrian legislation. Out of that total, the defendant institution recognised the 46 months corresponding to the period from July 1966, when Mrs Kauer's first child was born, to April 1970 when she moved to Belgium, as substitute qualifying periods spent child-rearing, pursuant to Paragraph 227a of the ASVG.

9 Mrs Kauer challenged that decision. In her view, the defendant institution should have recognised, not 46 months, but 82 months of child-rearing, since the period during which she had reared her children in Belgium should be considered to be a substitute qualifying period, in accordance with Community law.

10 The defendant institution resisted that claim, taking the view, first of all, that the periods of child-rearing completed within the European Economic Area were to be treated as periods completed in Austria only if they

occurred after the entry into force of the EEA Agreement on 1 January 1994, which was not the case in this particular instance. Next, under Article 2 of the Act of Accession relating to the conditions of accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden and the adjustments to the Treaties on which the European Union is founded (OJ 1994 C 241, p. 21, and OJ 1995 L 1, p. 1), the provisions of the original treaties and acts adopted, before accession, by the institutions were binding on those new Member States only as from 1 January 1995. Finally, according to the case-law of the Court, the provisions of Community law cannot be applicable retroactively to facts occurring before the accession of the Member State concerned.

11 Having failed in substance before the Arbeits-und Sozialgericht Wien (Labour and Social Security Court, Vienna), and on appeal from the Oberlandesgericht Wien (Higher Regional Court, Vienna), Mrs Kauer appealed on a point of law to the Oberster Gerichtshof.

12 In doubt as to the conformity of the Austrian legislation concerned with Community law, the Oberster Gerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

Is Article 94(1) to (3) 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 1249/92 of 30 April 1992, to be interpreted as precluding a national provision under which, for the purpose of pension insurance, periods of child-rearing in the country are to be regarded as substitute qualifying periods but such periods in a Member State of the EEA (in this case Belgium) are to be regarded as such only where they occur after that Agreement entered into force (1 January 1994) and, in addition, only on condition that entitlement to a cash benefit stemming from maternity insurance under the (Austrian) Allgemeines Sozialversicherungsgesetz (General Law on Social Security) (ASVG) or another (Austrian) federal law or to a maternity benefit under the (Austrian) Betriebshilfegesetz exists, or existed, in respect of that child?

The question referred for a preliminary ruling

13 By its question, the national court asks essentially whether Article 94(1) to (3) of Regulation No 1408/71 is to be interpreted as precluding application of a Member State's legislation under which periods of child-rearing completed in another State party to the EEA Agreement or in another Member State of the European Union are not treated as substitute periods for the purpose of old-age insurance unless:

- they were completed after the entry into force of that regulation in the first State, and

- the applicant is in receipt, or has received, for the children concerned, maternity benefits in cash or equivalent benefits under the legislation of that same State,

when such periods completed in national territory are treated as substitute periods for the purpose of old-age insurance without any limitation in time or any other condition.

14 According to the Austrian Government and the Commission, the transitional provisions laid down in Article 94(1) to (3) of Regulation No 1408/71 are not applicable to the periods which the applicant in the main proceedings spent in Belgium.

15 The Commission points out that, according to Article 94(1) of Regulation No 1408/71, [n]o right shall be acquired under this Regulation in respect of a period prior ... to the date of its application in the territory of the Member State concerned. Consequently, a right not acquired before the entry into force of Regulation No 1408/71 in Austria on 1 January 1994 cannot be acquired retroactively on the basis of that regulation. The Commission adds, however, that, in order to determine whether a right has been acquired before that date, reference must be made to the transitional provisions laid down in Article 94(2) and (3) of that regulation.

16 According to the Austrian Government and the Commission, Article 94(2) and (3) of Regulation No 1408/71 affords no basis for taking account, in the instant case, of periods spent before 1 January 1994 in raising children in another State party to the EEA Agreement or in another Member State of the European Union.

17 First of all, such periods do not constitute periods of insurance within the meaning of Article 94(2) of Regulation No 1408/71. In order for periods to be taken into account under that provision, the legislation of the State in question must recognise them as periods of insurance. However, the Austrian legislation makes recognition of child-raising periods as periods of insurance subject to conditions which are not fulfilled in the present case.

18 Second, the term contingency used in Article 94(3) of Regulation 1408/71 refers to events which, like the reaching of retirement age, the onset of invalidity or death, give rise to entitlement to social security benefits. It is clear from Paragraph 227a of the ASVG that the period spent by the applicant in the main proceedings in raising her children in Belgium does not, as such, afford entitlement to social security benefits under Austrian legislation.

19 Whilst accepting that, under Article 94(1) of Regulation No 1408/71, that Regulation cannot have the effect of creating a right in respect of the period prior to its entry into force, the Spanish Government considers that the regulation requires account to be taken of prior events, such as child-raising periods, which, after the entry into force of the regulation, may give rise to rights.

20 On consideration of those arguments the Court observes that, according to established case-law, the principle of legal certainty precludes a regulation from being applied retroactively, regardless of whether such application might produce favourable or unfavourable effects for the person concerned, unless a sufficiently clear indication can be found, either in the terms of the regulation or in its stated objectives, which allows the conclusion to be

drawn that the regulation was not merely providing for the future (Case 234/83 Gesamthochschule Duisburg [1985] ECR 327, paragraph 20). If the new law is thus valid for only for the future, it also applies, save for derogation, according to a generally recognised principle, to the future effects of situations which came about during the period of validity of the old law (see, to that effect, Case 96/77 Bauche and Delquignies [1978] ECR 383, paragraph 48; Case 125/77 Koninklijke Scholten-Honig and De Bijenkorf [1978] ECR 1991, paragraph 37; Case 40/79 P. v Commission [1981] ECR 361, paragraph 12; and Case 270/84 Licata v Economic and Social Committee [1986] ECR 2305, paragraph 31).

21 In providing that no right is to be acquired in respect of a period prior to the date of its application in the territory of the Member State concerned, Article 94(1) of Regulation No 1408/71 is in full accord with the principle of legal certainty reiterated above.

22 Equally, in order to allow the application of Regulation No 1408/71 to future effects of situations arising under the period of validity of the old law, Article 94(2) of the regulation lays down the obligation to take into consideration, for the purposes of determining rights to benefit, all periods of insurance, employment or residence completed under the legislation of any Member State before 1 October 1972 or before the date of its application in the territory of that Member State. It follows, therefore, from that provision that a Member State is not entitled to refuse to take account of periods of insurance completed in the territory of another Member State, for the purposes of establishment of a retirement pension, for the sole reason that they were completed before the entry into force of the regulation in its regard (Case C-227/89 Rönfeldt [1991] ECR I-323, paragraph 16).

23 Second, Article 94(3) of Regulation No 1408/71 also provides for account to be taken of any contingency, to which the right in question relates, even though it materialised prior to 1 October 1972 or to the date of [the Regulation's] application in the territory of the Member State concerned.

24 The question to be determined, therefore, is whether child-rearing periods completed in a Member State other than the competent State, prior to the date of application of Regulation No 1408/71 in the territory of that latter State, may constitute periods of insurance or a contingency within the meaning of paragraphs (2) and (3), respectively, of Article 94 of Regulation No 1408/71.

25 As regards Article 94(2) of Regulation No 1408/71, it must be borne in mind that the expression period of insurance used in that provision is defined in Article 1(r) of Regulation No 1408/71 as meaning periods of contribution or periods of employment or self-employment as defined or recognised as periods of insurance by the legislation under which they were completed or considered as completed, and all periods treated as such, where they are regarded by the said legislation as equivalent to periods of insurance.

26 That reference to domestic legislation clearly shows that Regulation No 1408/71, particularly for the purposes of aggregation of periods of insurance, refers to the conditions to which domestic law subjects recognition of a specific period as equivalent to periods of insurance properly so called (see, as regards Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers, (Journal Officiel 1958, p. 561), the judgment in Case 14/67 Landesversicherungsanstalt Rheinland-Pfalz v Welchner [1967] ECR 331, at page 337, and, as regards Regulation No 1408/71, the judgment in Case C-324/88 Vella and Others [1990] ECR I-257). However, such recognition of periods must be consistent with the provisions of the EC Treaty on the free movement of persons (see, in particular, Case C-302/90 Faux [1991] ECR I-4875, paragraphs 25 to 28, and Case C-322/95 Iurlaro [1997] ECR I-4881, paragraph 28).

27 It is still necessary to determine the legislation of the Member State under which it is appropriate, under Article 1(r) of the Regulation, to define or accept as periods equivalent to periods of insurance properly so called periods spent by the applicant in rearing her children in Belgium between 1970 and 1975.

28 It appears from the case-file that, after having, in April 1970, together with her family transferred her residence from Austria to Belgium, Mrs Kauer did not work in Belgium or pay contributions to the Belgian old-age insurance scheme. She did not work again until she had returned to Austria, starting in September 1975.

29 As the Advocate General observes in point 49 of his Opinion, it follows that, according to Article 13(2) of Regulation No 1408/71, as applicable before the addition of point (f) by Council Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulation No 1408/71 (OJ 1991 L 206, p. 2), Mrs Kauer, who had last been employed in Austria, would have continued to be subject to Austrian legislation during the periods spent raising her children in Belgium, on whose territory she pursued no activity as an employed or self-employed person (see Case 302/84 Ten Holder [1986] ECR 1821, paragraph 14, and Case C-215/90 [1992] ECR I-1823, paragraph 10).

30 The Austrian Government, however, contends that the question of the recognition of the periods spent by the applicant in rearing her children in Belgium must be determined on the basis of Belgian legislation. It relies in this regard on Article 13(2)(f) of Regulation No 1408/71, under which a person no longer covered by the legislation of a Member State previously applicable to him owing to pursuit of a gainful occupation is to be subject to the legislation of the State of residence if no legislation becomes applicable to him under Articles 13 to 17 of that Regulation.

31 That argument cannot be accepted. Even if it were necessary to take account of Article 13(2)(f), inserted into Regulation No 1408/71 by Regulation No 2195/91, that is to say many years after completion by Mrs Kauer of child-raising periods in Belgium, that provision would still not be relevant in the circumstances of the present case as regards taking into account child-raising periods for the purposes of old-age insurance.

32 It is clear from the judgment in Case C-135/99 Elsen [2000] ECR I-10409, paragraphs 25 to 28, that, as regards taking account of child-raising periods for the purposes of old-age insurance, the fact that a person, like Mrs Kauer, worked in only one Member State and was subject to the legislation of that State at the time when her child was born, allows a sufficiently close link to be established between those child-raising periods and the periods of insurance completed by virtue of the pursuit of a gainful occupation in the State under consideration.

It was indeed on account of completion of those latter periods that Mrs Kauer requested an Austrian institution to take account of periods spent in rearing her children during a break in her working career.

33 It is therefore with reference to Austrian law that it must be determined whether the periods which Mrs Kauer spent in rearing her children in Belgium are to be treated as periods equivalent to insurance periods.

34 In this regard, it is clear from Paragraph 227a(1) of the ASVG that periods spent rearing children in Austria are unconditionally treated as substitute periods for the purpose of old-age insurance. However, according to paragraph 3 of that provision, when they are completed in another State party to the EEA Agreement or in another Member State of the European Union, such periods are treated as substitute periods only on two conditions:

- they must have been completed after 1 January 1994, and

- the applicant must be in receipt of, or have received, for the children concerned, cash maternity allowances or the equivalent allowances under federal Austrian law.

The condition that the child-raising periods must have been completed after 1 January 1994

35 Any legislation of a Member State which makes recognition of substitute periods completed in the territory of another Member State subject to the condition that they must have been completed after the date of entry into force of Regulation No 1408/71 in the first Member State is inherently contrary to Article 94(2) of Regulation No 1408/71.

36 As is clear from paragraph 22 above, the very purpose of Article 94(2) is to preserve the effects of situations, such as completion of periods of insurance or substitute periods treated as such, arising under the old law, in order to determine rights under the new rules. To make such recognition subject to the condition that the periods concerned must have been completed after the date of entry into force of Regulation No 1408/71 in the State under consideration renders the transitional provisions laid down in Article 94(2) of that regulation quite purposeless.

37 A limitation in time such as that contained in Paragraph 227a(3) of the ASVG is therefore contrary to Article 94(2) of Regulation No 1408/71.

The requirement to be in receipt of, or to have received, cash maternity allowances or equivalent allowances under federal Austrian legislation

38 The next question to be determined is the legality, under Community law, of the second condition laid down in Paragraph 227a(3) of the ASVG, under which, in order to have periods spent rearing children outside Austria but within the European Economic Area treated as periods of insurance, the applicant must be receiving, or have received, for the children concerned, cash maternity allowances or equivalent allowances under federal Austrian law.

39 The Austrian Government maintains that, according to the case-law of the Court, the Member States are at liberty to organise their social security schemes as they wish and, in particular, to determine the conditions under which periods of insurance may be taken into account, on condition that no discrimination is made between their own nationals and those of other Member States. In that regard, the Austrian Government contends that the Republic of Austria is entitled to require the existence of a sufficiently close link with its social security scheme before child-raising periods completed in another Member State may be taken into account. In its view, it follows from the judgment in Case C-275/96 Kuusijärvi [1998] ECR I-3419 that, when the person concerned resides in a Member State other than that in which he pursued a gainful occupation before devoting himself to rearing his children, it is the State of residence, not the State in which the gainful occupation was pursued, which is competent for taking into consideration periods devoted to child-rearing.

40 The Austrian Government adds that the periods in question in the present case were completed prior to the date of entry into force in Austria of the EEA Agreement and to the date of accession of the Republic of Austria to the European Union, so that the disallowance of those periods can have no unfavourable implications for the free movement of persons in the European Union or for the rights of its citizens. The facts of the matter are that Mrs Kauer transferred her residence and stayed in Belgium, then returned to Austria before those two dates. In those circumstances, it cannot be argued that Mrs Kauer availed herself of a right to the free movement of persons guaranteed to her by the Treaty.

41 The Austrian Government also contends that, even if the periods of child-rearing completed in Belgium had been after 1 January 1994, Mrs Kauer would not have been able to claim recognition for them under Austrian old-age insurance since, not having pursued any gainful occupation before the birth of her first child, she could not be entitled to cash maternity allowances under Austrian legislation.

42 As far as that contention is concerned, it must be observed first of all that the legality of a requirement such as the second condition laid down in Paragraph 227a(3) of the ASVG must be assessed under Community law as it would have been applicable if the child-rearing periods in question had been completed after the accession of the Republic of Austria.

43 The national legislation in question introduces, for the determination of periods of insurance and periods treated as such for the purpose of old-age insurance, a difference of treatment in that it unconditionally takes into account child-raising periods completed in national territory and makes the taking into account of child-raising periods spent in another State party to the EEA Agreement or in another Member State subject to receipt of cash maternity allowance or equivalent allowances under federal Austrian legislation.

44 When it applies to child-raising periods completed after the accession of the Republic of Austria to the European Union, such legislation is liable to work to the disadvantage of Community nationals who, having resided or worked in Austria, then exercise their right, as workers, as members of a worker's family or as Union citizens, to free movement and residence in the Member States, as guaranteed in Articles 8a, 48 and 52 of the EC Treaty (now, after amendment, Articles 18 EC, 39 EC and 43 EC). It is essentially those Community nationals who are affected by the problem of completion of child-raising periods outside Austria.

45 In the second place, where, as in the present case, the national legislation applies to child-raising periods completed before the date of application in the Member State in question of Regulation No 1408/71, the determination of a pension entitlement arising after Austria's accession to the European Union, even on the basis of periods of insurance completed before that date, must be carried out by the Austrian authorities in accordance with Community law and, in particular, in accordance with the provisions of the Treaty relating to the free movement of workers or again the freedom of every citizen of the Union to move and reside in the territory of the Member States (see, to that effect, Elsen, cited above, paragraph 33).

46 Second, as regards more particularly the taking into account of the periods in question in the main proceedings, application should be made of the transitional provision laid down in Article 94(2) of Regulation No 1408/71, which is meant to cover situations arising at a time when the Treaty was still not in application in the Member State under consideration. The very purpose of that provision, as already emphasised in paragraph 22 above, is to enable Regulation No 1408/71 to apply to the future effects of situations coming into being at a time when, by definition, freedom of movement of persons was still not yet guaranteed in intercourse between the Member State under consideration and the Member State in whose territory the specific situations eventually to be taken into account occurred.

47 In those circumstances, the fact that Mrs Kauer resided in Belgium before the entry into force of the EEA Agreement or before the accession of the Republic of Austria to the European Union cannot, as such, impede application of Article 94(2) of Regulation No 1408/71.

48 However, the application of the second condition laid down in Paragraph 227a(3) of the ASVG in relation to child-raising periods completed before the date of application of Regulation No 1408/71 is likely to make the benefit of Article 94(2) of that regulation illusory when the national legislation itself does not guarantee payment of cash maternity benefits in favour of persons residing outside national territory, in the very absence of a Community rule, such as Article 19(1)(b) of Regulation No 1408/71, which could have guaranteed such payments. Such a provision cannot in fact be applied with retroactive effect, in accordance with Article 94(1) of Regulation No 1408/71.

49 The fact that Mrs Kauer, whose three children were born in Austria, did not receive cash maternity allowances under Austrian legislation on the ground, as the Austrian Government explained, that she had ceased her gainful occupation before the birth of her first child, does not affect the foregoing considerations regarding the legality of the condition relating to the grant of cash maternity allowances or equivalent allowances under federal Austrian legislation, having regard to Articles 8a, 48 and 52 of the Treaty and Article 94(2) of Regulation No 1408/71.

50 Consequently, it must be held that the requirement for cash maternity allowances or equivalent allowances to have been granted under federal Austrian legislation, such as the requirement in Paragraph 227a(3) of the ASVG, is contrary to Article 94(2) of Regulation No 1408/71 read in conjunction, depending on the case, with Articles 8a, 48 and 52 of the Treaty.

51 In the circumstances, Article 94(3) of Regulation No 1408/71, does not need to be interpreted.

52 It follows from all the foregoing considerations that Article 94(2) of Regulation No 1408/71, read in conjunction, depending on the case, with Articles 8a, 48 and 52 of the Treaty, is to be interpreted as precluding application of a Member State's legislation under which child-raising periods completed in another State party to the EEA Agreement or in another Member State of the European Union are not treated as substitute periods for the purposes of old-age insurance unless:

- they were completed after the entry into force of that regulation in the first State, and

- the applicant receives, or received, for the children concerned, cash maternity allowances or equivalent allowances under the legislation of that same State,

when such periods completed in national territory are treated as substitute periods for the purposes of old-age insurance without any limitation in time or any other condition.

Decision on costs

Costs

53 The costs incurred by the Austrian and Spanish Governments and by the Commission, 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.

Operative part

On those grounds,

THE COURT (Fifth Chamber),

in answer to the questions referred to it by the Oberster Gerichtshof by order of 14 December 1999, hereby rules:

Article 94(2) 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, read in conjunction, depending on the case, with Articles 8a, 48 and 52 of the EC Treaty (now, after amendment, Articles 18 EC, 39 EC and 43 EC), is to be interpreted as precluding application of a Member State's legislation under which child-raising periods completed in another State party to the Agreement on the European Economic Area of 2 May 1992 or in another Member State of the European Union are not treated as substitute periods for the purposes of old-age insurance unless

- they were completed after the entry into force of that regulation in the first State, and

- the applicant receives, or received, for the children concerned, cash maternity allowances or equivalent allowances under the legislation of that same State,

when such periods completed in national territory are treated as substitute periods for the purposes of old-age insurance without any limitation in time or any other condition.