

JAUCH

JUDGMENT OF THE COURT

8 March 2001 *

In Case C-215/99,

REFERENCE to the Court under Article 177 of the EC Treaty (now Article 234 EC) by the Landesgericht Feldkirch, Austria, for a preliminary ruling in the proceedings pending before that court between

Friedrich Jauch

and

Pensionsversicherungsanstalt der Arbeiter

on the interpretation of Articles 10a(1) and 19(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 (OJ 1997 L 28, p. 1),

* Language of the case: German.

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, C. Gulmann, A. La Pergola, M. Wathelet, V. Skouris (Presidents of Chambers), D.A.O. Edward, J.-P. Puissochet (Rapporteur), P. Jann, L. Sevón, R. Schintgen, F. Macken, N. Colneric, S. von Bahr, J.N. Cunha Rodrigues and C.W.A. Timmermans, Judges,

Advocate General: S. Alber,
Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- the Austrian Government, by C. Stix-Hackl, acting as Agent,
- the German Government, by W.-D. Plessing and C.-D. Quassowski, acting as Agents,
- the Commission of the European Communities, by P. Hillenkamp and C. Egerer, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of the Austrian Government, represented by G. Hesse, acting as Agent; the French Government, represented by C. Bergeot, acting as Agent; the Netherlands Government, represented by M.A. Fierstra, acting as Agent; the United Kingdom Government, represented by E. Sharpston QC; and the Commission, represented by V. Kreuzsitz and C. Egerer, acting as Agents, at the hearing on 25 October 2000,

after hearing the Opinion of the Advocate General at the sitting on 14 December 2000,

gives the following

Judgment

1 By order of 16 March 1999, received at the Court on 7 June 1999, the Landesgericht (Regional Court) Feldkirch referred to the Court for a preliminary ruling under Article 177 of the EC Treaty (now Article 234 EC) a question on the interpretation of Articles 10a(1) and 19(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 (OJ 1997 L 28, p. 1) ('Regulation No 1408/71').

2 That question has been raised in proceedings between Mr Jauch and the Pensionsversicherungsanstalt der Arbeiter (Workers' Pension Insurance Institution) concerning the latter's refusal to pay Mr Jauch the Pflegegeld (care allowance) provided for by the Bundespflegegeldgesetz (Austrian Federal Law on care allowance, BGBl. I 1993, p. 110) ('the BPGG').

Community legislation

- 3 Article 4(1) of Regulation No 1408/71 states:

‘This Regulation shall apply to all legislation concerning the following branches of social security:

(a) sickness... benefits;

(b) invalidity benefits...;

(c) old-age benefits;

...’.

- 4 Under Article 4(2a) of Regulation No 1408/71, the latter applies to special non-contributory benefits which are provided under legislation or schemes other than those referred to in Article 4(1), where such benefits are intended *inter alia* to provide supplementary, substitute or ancillary cover against the risks covered by the branches referred to in Article 4(1).

- 5 Article 10a(1) of Regulation No 1408/71 provides:

‘Notwithstanding the provisions of Article 10 and Title III, persons to whom this Regulation applies shall be granted the special non-contributory cash benefits referred to in Article 4(2a) exclusively in the territory of the Member State in which they reside, in accordance with the legislation of that State, provided that such benefits are listed in Annex IIa. Such benefits shall be granted by and at the expense of the institution of the place of residence.’

- 6 Annex IIa to Regulation No 1408/71, entitled ‘Special non-contributory benefits’, mentions in point K, ‘Austria’, under (b), the following benefit:

‘Care allowance (Pflegegeld) under the Austrian Federal Care Allowance Act (Bundespflegegeldgesetz) with the exception of care allowance granted by accident insurance institutions where the handicap is caused by an accident at work or occupational disease.’

- 7 Finally, under Article 19(1) of Regulation No 1408/71, which features in Title III of that regulation:

‘An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of

the competent State for entitlement to benefits... shall receive in the State in which he is resident:

- (a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the provisions of the legislation administered by that institution as though he were insured with it;

- (b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.'

National legislation

8 In Austria, since 1993, the care allowance under the BPGG is, as stated in Paragraph 1 of that Law, intended to provide care and assistance, in the form of a flat-rate payment, to persons reliant on care in order to improve their opportunity of leading a life which is autonomous and meets their needs. Paragraph 3(1) of the BPGG, which defines the personal scope of the allowance, states *inter alia* that the persons concerned are entitled to that allowance if they are habitually resident in Austria.

9 Under Paragraph 22 of the BPGG, the care allowance is payable by the compulsory pension and accident insurance institutions. However, Paragraph 23 of the BPGG provides that the State is to 'reimburse to the institutions responsible for statutory pension insurance the expenditure established pursuant to the present Federal Law in the separate income account, to be drawn up in

accordance with the provisions on social insurance institutions, which has been incurred on care allowance, benefits in kind, travel costs, the services of the medical officer and other care, postal delivery fees, the corresponding proportion of administrative expenses, and other expenditure’.

The main proceedings

- 10 Mr Jauch, a German national who has always resided in Lindau, a town in Germany close to the Austrian border, worked in Austria from May 1941 to June 1958, during which period he was compulsorily insured, and then from July 1958 to November 1981, during which period he was voluntarily insured under the Austrian pension insurance scheme. He thus completed a total of 480 insurance months in Austria, and has since 1 May 1995 been in receipt of a retirement pension paid by the Pensionsversicherungsanstalt der Arbeiter.
- 11 As Mr Jauch completed periods of insurance in Germany only to a negligible extent, he does not receive any German pension. However, from 1 September 1996 to 31 August 1998, by virtue of a decision of 28 November 1996, he received German care insurance benefits paid by the Allgemeine Ortskrankenkasse (AOK) Bayern, Pflegekasse Lindau (General Local Health Insurance Fund for Bavaria, Lindau Care Fund). That institution ceased paying those benefits, however, in reliance on the judgment of the Court of Justice in Case C-160/96 *Molenaar* [1998] ECR I-843.
- 12 By decision of 7 September 1998, the Pensionsversicherungsanstalt der Arbeiter rejected Mr Jauch’s claim for care allowance under the BPGG. Since the competent authorities in Austria and Germany had thus refused him the right to

an allowance in connection with his reliance on care, Mr Jauch brought proceedings against those refusals in both Member States.

- 13 In the Austrian proceedings brought before the Landesgericht Feldkirch, the defendant in the main proceedings submitted that the action should be dismissed on the ground that care allowance under the BPGG is expressly listed in Annex IIa to Regulation No 1408/71 as a special non-contributory benefit within the meaning of Article 10a of that regulation, available only to persons who reside in the territory of the Member State concerned.
- 14 Having regard to the particular circumstances in which the arrangements for financing the care allowance entered into force, with a corresponding increase in sickness insurance contributions, the Landesgericht is, however, uncertain whether care allowance is in fact a special non-contributory benefit within the meaning of Article 4(2a) in conjunction with Article 10a of Regulation No 1408/71.
- 15 The Landesgericht Feldkirch accordingly decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

‘Is it contrary to Article 19(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, in its current version, to make entitlement to care allowance under the Bundespflegegeldgesetz (BPGG) (Austrian Federal Law on care allowance, BGBl. 110/1993), in its current version, dependent on the person reliant on care being habitually resident in Austria?’

The question referred for a preliminary ruling

- 16 By this question the national court is essentially asking whether care allowance under the BPGG can be regarded as a special non-contributory benefit within the meaning of Article 10a of Regulation No 1408/71, which provides that the persons concerned are to be granted such a benefit exclusively in the territory of the Member State in which they reside and in accordance with the legislation of that State, or whether the residence condition for the grant of that allowance is contrary to Article 19(1) of Regulation No 1408/71 and the corresponding provisions of the other sections of Chapter 1 of Title III of that regulation.
- 17 As noted in paragraph 6 above, care allowance is included on the list of special non-contributory cash benefits within the meaning of Article 4(2a) of Regulation No 1408/71 which forms Annex IIa to that regulation. The Austrian Government submits that the inclusion of a benefit in that list suffices for it to be classified as a special non-contributory benefit. It bases its argument on the judgments in Case C-20/96 *Snares* [1997] ECR I-6057, Case C-297/96 *Partridge* [1998] ECR I-3467 and Case C-90/97 *Swaddling* [1999] ECR I-1075. In paragraph 30 of *Snares* the Court held that the fact that legislation on disability living allowance is referred to in Annex IIa to Regulation No 1408/71 is to be accepted as establishing that benefits granted under that legislation are special non-contributory benefits. In paragraph 31 of *Partridge* and paragraph 24 of *Swaddling* the Court used that analysis to determine the legal regime governing, respectively, attendance allowance and income support. It should also be observed that in those three cases the special non-contributory character of the benefits in question was not discussed.
- 18 Article 4(2a) of Regulation No 1408/71 concerns 'special non-contributory benefits' which are provided under legislation other than that relating to the traditional branches of social security listed in Article 4(1) of that regulation, or even come under social and medical assistance expressly excluded from the scope

of Regulation No 1408/71 by Article 4(4), but which may nevertheless be brought within the field of social security to which that regulation applies if they are intended to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in Article 4(1) of the regulation.

19 Furthermore, Article 10a of Regulation No 1408/71 reserves the special non-contributory cash benefits referred to in Article 4(2a) of the regulation to persons residing on national territory, provided that those benefits are listed in Annex IIa to the regulation.

20 As the Court has consistently held (see, for example, Case 284/84 *Spruyt* [1986] ECR 685, paragraphs 18 and 19), the provisions of Regulation No 1408/71 adopted to give effect to Article 51 of the EC Treaty (now, after amendment, Article 42 EC) must be interpreted in the light of the objective of that article, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. The aim of Articles 48 and 49 of the EC Treaty (now, after amendment, Articles 39 EC and 40 EC), Article 50 of the EC Treaty (now Article 41 EC) and Article 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed them by the legislation of one Member State, especially where those advantages represent the counterpart of contributions which they have paid.

21 In that context, it is permissible for the Community legislature to adopt provisions which derogate from the principle of the exportability of social security benefits (see, *inter alia*, *Snares*, paragraph 41). Derogating provisions of that kind, such as those provided for by Article 10a of Regulation No 1408/71, must be interpreted strictly. This means that they can apply only to benefits which fulfil the conditions they define. It follows that Article 10a can apply only to benefits which satisfy the conditions defined in Article 4(2a) of Regulation

No 1408/71, that is, benefits which are both special and non-contributory and are listed in Annex IIa to that regulation.

- 22 The Court must therefore examine whether the benefit at issue in the main proceedings, which is listed in Annex IIa to Regulation No 1408/71, is special and non-contributory.

Special benefit

- 23 While the German Government and the Commission accept that care allowance is a benefit to which Regulation No 1408/71 applies, the Austrian Government submits that it is a measure which forms part of its social assistance policy. It considers that the risk of 'reliance on care' is closer to the risk of 'poverty' than to that of 'sickness'.
- 24 However, the Court has already decided this point in the *Molenaar* case. It held that the provisions concerning the grant of German care insurance benefits confer on recipients a legally defined right and that those benefits, the aim of which is to improve the state of health and quality of life of persons reliant on care, are essentially intended to supplement sickness insurance benefits.
- 25 According to settled case-law, a benefit may be regarded as a social security benefit in so far as it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a legally defined

position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14; Case C-356/89 *Newton* [1991] ECR I-3017; Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 15; and *Molenaar*, paragraph 20). It was on the basis of that case-law, taking account of the constituent elements of the German care insurance benefits, that the Court held, in paragraph 25 of *Molenaar*, that those benefits were to be regarded as ‘sickness benefits’ within the meaning of Article 4(1)(a) of Regulation No 1408/71 and, in paragraph 36 of that judgment, that they were to be regarded as ‘cash benefits’ of sickness insurance as referred to *inter alia* in Article 19(1)(b) of that regulation.

- 26 In the case in point in the main proceedings, while care allowance may possibly have a different legal regime at national level, it nevertheless remains of the same kind as the German care insurance benefits at issue in *Molenaar*, and is likewise granted objectively on the basis of a legally defined situation.
- 27 First, under Paragraph 3(1) of the BPGG, entitlement to care allowance is conferred only on recipients of a pension who have suffered an accident at work or an occupational disease or recipients of a pension under the Allgemeines Sozialversicherungsgesetz (General Law on social security). Second, under Paragraphs 22 and 23 of the BPGG, the compulsory pension and accident insurance institutions are initially responsible for paying the allowance, being subsequently reimbursed by the federal budget for their expenditure in this respect.
- 28 The conditions for granting care allowance and the way in which it is financed cannot have the intention or the effect of changing the character of care

allowance as analysed in the *Molenaar* judgment, in which it was held that benefits of that type are essentially intended to supplement sickness insurance benefits, to which they are, moreover, linked at the organisational level, in order to improve the state of health and quality of life of persons reliant on care (*Molenaar*, paragraph 24). In those circumstances, even if they have their own characteristics, such benefits must be regarded as 'sickness benefits' in cash within the meaning of Article 4(1)(a) and (b) of Regulation No 1408/71 (*Molenaar*, paragraph 25). It is of no importance in those circumstances that the care allowance is intended to provide a financial supplement, having regard to a person's reliance on care, to a pension paid on a basis other than sickness. Thus, whether it is contributory or non-contributory, the allowance, as the German Government moreover observes, must be regarded as a cash 'sickness benefit' within the meaning of Article 4(1)(a) of Regulation No 1408/71, and does not therefore come under Article 4(2a) of that regulation.

Non-contributory benefit

29 As regards the method of financing the care allowance, the aim of the BPGG which introduced it was to create a system intended to ensure that all persons reliant on care should receive uniform cash benefits throughout Austria, thereby supplementing the cover of the social risk of reliance on care already ensured at regional level by some *Länder*.

30 The BPGG further provides that the allowance is to be financed federally under the procedure described in paragraph 27 above. Thus, in the case in point in the main proceedings, the cash benefits are initially paid by the statutory pension and accident insurance institutions, and Paragraph 23 of the BPGG provides that the

sums thus paid by those institutions are then repaid out of federal funds in the form of a reimbursement. At the budgetary level, the Austrian Government released the funds needed for that expenditure by reducing the federal contribution to pension insurance. In order to balance that reduction, the sickness insurance contribution payable by the pension insurance institutions was reduced by the same amount as the reduction in the federal contribution to pension insurance.

- 31 The Commission, however, considers, first, that the financing is in reality borne by the persons insured under the social security scheme, since, to compensate for the reduction of sickness insurance receipts, contributions to that insurance were increased in 1993. It observes, second, that the care allowance thus financed benefits insured persons only.
- 32 It must be stated, with respect to this latter argument, that no principle or provision of Community law prohibits the legislature of a Member State from establishing different social protection schemes for different social or occupational categories. The fact that only persons insured under the social security scheme receive the care allowance introduced by the BPGG is not capable by itself of establishing that that benefit is financed by their sickness insurance contributions, even though, by virtue of the *Molenaar* judgment, the allowance must be analysed as a 'sickness benefit'. No rule of Community law prohibits national legislation from treating the risk of reliance on care separately and financing it differently from other sickness benefits.
- 33 As regards the increase in sickness insurance contributions, however, the Austrian Government itself acknowledges that this was decided on in order to compensate for the reduction of the contributory financial transfers from pension insurance to

the sickness insurance institutions, that reduction in turn being intended to reduce to a proper level the federal contribution to pension insurance so as to release the necessary resources for financing the new care allowance. The financing of that benefit was therefore made possible, without altering sickness, old-age and accident benefits, by means of increasing sickness insurance contributions. The link, albeit indirect, with sickness insurance contributions is all the stronger in that the abstraction of resources from sickness insurance is made from the contributory portion of receipts. Care allowance is therefore contributory in character.

34 Care allowance does not therefore meet the conditions in Article 10a of Regulation No 1408/71, which reserves the benefit of the special non-contributory benefits referred to in Article 4(2a) of that regulation to persons resident in the Member State in which they are paid.

35 It follows that, in accordance with the provisions of Article 19(1)(b) of Regulation No 1408/71 and the corresponding provisions of the other sections of Chapter 1 of Title III of that regulation, care allowance, which is to be regarded as a sickness benefit in cash, must be provided irrespective of the Member State in which a person reliant on care, who satisfies the other conditions for receipt of the benefit, is resident.

36 In those circumstances, the answer to the question referred must be that Article 19(1) of Regulation No 1408/71 and the corresponding provisions of the other sections of Chapter 1 of Title III of that regulation preclude entitlement to care allowance under the BPGG from being subject to the condition that the person reliant on care must be habitually resident in Austria.

Costs

- 37 The costs incurred by the Austrian, German, French, Netherlands and United Kingdom 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 action pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the question referred to it by the Landesgericht Feldkirch by order of 16 March 1999, hereby rules:

Article 19(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, and the corresponding provisions of the other sections of Chapter 1 of Title III of that regulation preclude entitlement to Pflegegeld (care allowance) under the Bundespflegegeldgesetz (Austrian Federal Law on care allowance) from being subject to the condition that the person reliant on care must be habitually resident in Austria.

Rodríguez Iglesias	Gulmann	La Pergola
Wathelet	Skouris	Edward
Puissochet	Jann	Sevón
Schintgen	Macken	Colneric
von Bahr	Cunha Rodrigues	Timmermans

Delivered in open court in Luxembourg on 8 March 2001.

R. Grass

G.C. Rodríguez Iglesias

Registrar

President