

**Judgment of the Court (Sixth Chamber) of 12 June 1997**

**Pascual Merino García v Bundesanstalt für Arbeit**

**Reference for a preliminary ruling: Bundessozialgericht – Germany**

***Social security of migrant workers - Regulation (EEC) No 1408/71 - Persons covered - 'Employed persons' - Family benefits***

**Case C-266/95**

*European Court reports 1997 Page I-03279*

In Case C-266/95,

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

Pascual Merino García

and

Bundesanstalt für Arbeit

on the interpretation and validity of Point I C of Annex I to 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),

THE COURT

(Sixth Chamber),

composed of: G.F. Mancini (Rapporteur), President of the Chamber, C.N. Kakouris, G. Hirsch, H. Ragnemalm and R. Schintgen, Judges,

Advocate General: N. Fennelly,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Mr Merino García, by Angel González Maeztu, Head of the Social Affairs Section of the Spanish Consulate-General, Stuttgart, acting as Agent,
- the German Government, by Ernst Röder, Ministerialrat in the Federal Ministry of Economic Affairs, and Bernd Kloke, Oberregierungsrat in that Ministry, acting as Agents,
- the Spanish Government, by Alberto José Navarro González, Director General for Community Legal Affairs, and Gloria Calvo Díaz, Abogado del Estado, of the State Legal Service, acting as Agents,
- the Council of the European Union, by Anna Lo Monaco and Stephan Marquardt, of its 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 that service, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Mr Merino García, represented by Angel González Maeztu; the German Government, represented by Ernst Röder; the Spanish Government, represented by D. Santiago Ortiz Vaamonde, Abogado del Estado, of the State Legal Service, acting as Agent; the Council, represented by Guus Houttuin, of its Legal Service, acting as Agent, and the Commission, represented by Peter Hillenkamp, Legal Adviser, acting as Agent, at the hearing on 23 January 1997,

after hearing the Opinion of the Advocate General at the sitting on 6 March 1997,

gives the following

Judgment

**Grounds**

**1** By order of 20 June 1995, received at the Court on 8 August 1995, the Bundessozialgericht (Federal Social Court) referred to the Court for a preliminary ruling under Article 177 of the EC Treaty questions concerning the interpretation and validity of Point I C of Annex I to 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; hereinafter 'the Regulation').

**2** Those questions were raised in proceedings between Mr Merino García and Bundesanstalt für Arbeit (Federal Labour Office) concerning its refusal to grant him family allowances in respect of February 1986 and February 1987 when he was on unpaid leave.

### **The Regulation**

**3** Article 1(a) of the Regulation sets out the following definitions of the expressions 'employed person' and 'self-employed person':

(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;

(iii) any person who is compulsorily insured for several of the contingencies covered by the branches dealt with in this Regulation, under a standard social security scheme for the whole rural population in accordance with the criteria laid down 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; [...]

**4** Under Article 13(1), persons to whom the Regulation applies are in principle subject only to the legislation of a single Member State.

**5** Article 13(2)(a) further provides that a person employed in the territory of one Member State is 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.

**6** In accordance with Article 73 of the Regulation, an employed or 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.

**7** Point I C of Annex I to the Regulation provides as follows:

C. Germany

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.'

### **The national legislation**

**8** Paragraph 1(1)(1) of the Bundeskindergeldgesetz (Federal Law on Allowances in respect of Dependent Children, BGBl. I, p. 265; hereinafter 'the BKGG') provides that persons domiciled or habitually residing within the territory to which that law applies are entitled to family allowances in respect of their children and persons treated as such by virtue of Paragraph 2(1).

**9** Paragraph 2(5) of the BKGG provides that children who are not domiciled or habitually resident within the territory to which that law applies are not taken into account for the purposes of payment of family allowances.

**10** By virtue of Paragraph 9 of the BKGG, family allowances are payable from the beginning of the month in which the conditions of entitlement are satisfied until the end of the month in which they cease to be satisfied.

**11** Paragraph 42(2) provides that the BKGG is without prejudice to the provisions of Community regulations.

**12** Paragraph 311(1) of the Reichsversicherungsordnung (Social Insurance Code, BGBl. I, p. 799; hereinafter 'the RVO') provides that compulsory affiliation to the sickness insurance scheme is retained for a maximum of three weeks where the employment relationship remains in being but no pay is received.

**13** By virtue of the second and third sentences of Paragraph 104(1) of the Arbeitsförderungsgesetz (Law on the Promotion of Employment, BGBl. I, p. 582; hereinafter 'the AFG'), any period of unpaid employment exceeding four weeks is not taken into account in aggregating periods qualifying a person for unemployment benefit.

Background to the dispute

**14** Mr Merino García, a Spanish national, resides and works in Germany as an employed person. His three children reside in Spain.

**15** On 19 December 1989 Mr Merino García applied to Bundesanstalt für Arbeit for German family allowances for his children in respect of the period from January 1986 to December 1988, which included periods - from 20 January 1986 to 2 March 1986 and from 13 January 1987 to 2 March 1987 - during which he had taken unpaid leave with his employer's consent. It is clear from the documents before the Court that the leave in question did not terminate his employment relationship.

**16** Bundesanstalt für Arbeit granted Mr Merino García the allowances sought for the period in question with the exception of the months of February 1986 and February 1987 (hereinafter 'the calendar months at issue'). It maintained that, since both periods of unpaid leave exceeded four weeks, it followed from the combined provisions of Paragraph 104(1) of the AFG and Point I C(a) of Annex I (hereinafter 'the Annex') to the Regulation that, during those periods, Mr Merino García could not be regarded as an employed person for the purposes of Article 73 of the Regulation.

**17** By application of 19 February 1990, Mr Merino García brought proceedings before the Sozialgericht (Social Court) Mannheim for payment by Bundesanstalt für Arbeit of family allowances for the two calendar months at issue. His application was dismissed by the Sozialgericht Mannheim on 14 October 1992 and by the Landessozialgericht (Higher Social Court) Baden-Württemberg on 21 September 1993.

**18** On 27 May 1994 Mr Merino García appealed on a point of law against the Landessozialgericht's decision. In his appeal, he maintained that he was an employed person for the purposes of Article 73 of the Regulation and that the provisions of the Annex discriminated against Community workers whose children resided in another Member State.

### The questions referred

**19** In its order for reference, the Bundessozialgericht expresses the view that Mr Merino García was not entitled to family allowances for the calendar months at issue either under the BKG or under the combined provisions of Article 1(a) and Article 73 of the Regulation and the Annex thereto. However, since it was uncertain as to the Annex's validity, the Bundessozialgericht decided to stay proceedings and refer the following questions to the Court:

1. Is Point I C of Annex I to Regulation (EEC) No 1408/71 compatible with the EC Treaty, in particular Article 48(2) thereof, in so far as it leads to a situation where workers on extended unpaid leave with children resident outside Germany have no right to child allowance in respect of full calendar months falling within that leave but such workers with children resident in Germany do have that right?

2. If Point I C of Annex I to Regulation No 1408/71 is invalid, is the consequence thereof that an "employed person" within the meaning of Article 73 of Regulation No 1408/71 covers any person who has been given unpaid leave of absence by his employer on the basis of a voluntary agreement, or are there restrictions in that respect (for example, as regards the duration of the leave of absence)?

**20** By those questions, the national court essentially asks first whether, for the purposes of paying family benefits under German legislation in accordance with Article 73 of the Regulation, the expression 'employed persons' must be interpreted as designating only employed persons who satisfy the definition resulting from the combined provisions of Article 1(a)(ii) and the Annex. If so, the national court asks whether the Annex is valid having regard to Article 48(2) of the Treaty. Lastly, if the Annex is valid, the national court asks whether Article 48(2) of the Treaty precludes the application of national legislation which results in an employed person whose children are resident in another Member State being refused family allowances in respect of full calendar months falling within an extended period of unpaid leave, where employed persons whose children are resident in the State concerned are entitled to such allowances. Those three aspects may conveniently be considered in turn.

### The interpretation of the Annex

**21** The persons covered by the Regulation are defined by Article 2, which forms part of Title I, entitled 'General provisions'. Article 2(1) provides that the Regulation is to apply in particular 'to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States'.

**22** The expression 'employed persons' used in Article 2(1) of the Regulation is defined in Article 1(a). 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 (Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 9).

**23** It must be held that a person in the situation of the appellant in the main proceedings comes within the definition of 'employed person', in particular within the meaning of Article 1(a)(i) of the Regulation, in so far as he 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.

**24** However, as the Court held in *Joined Cases C-4/95 and C-5/95 Stöber and Pereira* [1997] ECR I-0000, paragraph 29, concerning self-employed persons, it appears from the very wording of the Annex to which Article 1(a)(ii) of Regulation No 1408/71 refers that 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 the Regulation (see also to this effect *Joined Cases C-245/94 and C-312/94 Hoever and Zachow* [1996] ECR I-0000, paragraph 29).

**25** If a worker in a situation of the kind before the national court were allowed to rely on one of the other definitions of employed person set out in Article 1(a) in order to qualify for German family benefits, that would be

tantamount to depriving the provision in the Annex of all effectiveness (Stöber and Pereira, cited above, paragraph 32).

**26** Consequently, for the purposes of paying family benefits under German legislation in accordance with Article 73 of the Regulation, the expression 'employed persons' must be construed as designating only employed persons who satisfy the definition resulting from the combined provisions of Article 1(a)(ii) and the Annex.

Validity of the Annex

**27** It should first be noted that Article 51 of the EC Treaty provides for coordination, not harmonization, of the social security legislation of the various Member States. Substantive and procedural differences between the social security schemes of individual Member States, and hence in the rights of persons working in those States, are unaffected by Article 51 of the Treaty (see, in particular, Case 41/84 Pinna v Caisse d'Allocations Familiales de la Savoie [1986] ECR I, paragraph 20).

**28** Article 73 of the Regulation is intended in particular to prevent Member States from making entitlement to, and the amount of, family benefits dependent on residence of the members of the worker's family in the Member State providing the benefits, so that Community workers are not deterred from exercising their right to freedom of movement (Hoever and Zachow, cited above, paragraph 34).

**29** It is clear from the wording of Article 73 of the Regulation that it does not itself confer any entitlement to family benefits. Such benefits are granted on the basis of the relevant provisions of national law, in this case the BGGG.

**30** Furthermore, it does not follow from the Annex that, in situations other than those to which it refers, Community nationals who work in Germany and whose children reside in another Member State have no entitlement to family benefits. As a result, as the Advocate General pointed out at point 26 of his Opinion, in so far as the appellant in the main proceedings has lost his entitlement to family benefits in respect of the two periods of unpaid leave at issue, it is by operation of the provisions of the BGGG, not of the Annex to the Regulation.

**31** Consequently, consideration of that aspect of the questions referred for a preliminary ruling does not disclose any factor such as to affect the validity of the Annex.

Interpretation of Article 48(2) of the Treaty

**32** According to Mr Merino García, since, as a result of the second and third sentences of Paragraph 104(1) of the AFG, he is entitled to family benefits for his children residing in another Member State only in respect of the period during which he paid unemployment insurance contributions, that provision hinders the free movement of persons and gives rise to discrimination contrary to Article 48(2) of the Treaty.

**33** The Court has pointed out on a number of occasions that the principle of equal treatment to which that provision gives expression prohibits not only overt discrimination based on nationality but also all covert forms of discrimination which, by applying other distinguishing criteria, achieve in practice the same result (Pinna, cited above, paragraph 23).

**34** In the present case, Mr Merino García has been refused entitlement to family allowances for his children residing in Spain, whereas the BGGG allows such benefits to be granted to anyone who has his domicile or habitual residence within the territory to which that law applies, provided that his dependent children are domiciled or habitually reside in that territory. Also, it is undisputed that Article 48(2) of the Treaty applies in this case since the person concerned continued to be insured in Germany against the risk of sickness, by reason of his employment relationship, during a period covered by the calendar months at issue.

**35** The German Government's argument that Paragraph 2(5) of the BGGG affects German nationals whose children do not satisfy the residence requirement, as well as foreigners, cannot be regarded as well founded. As the Court held in paragraph 24 of the judgment in Pinna, the problem of members of the family residing outside the Member State responsible for paying benefits arises essentially for migrant workers (see, to the same effect, Stöber and Pereira, paragraph 38).

**36** In so far as the case-file contains no material capable of providing objective justification for that difference in treatment, it must be regarded as discriminatory and therefore as incompatible with Article 48(2) of the Treaty.

**37** The answer to the national court's questions must therefore be that, for the purposes of paying family benefits under German legislation in accordance with Article 73 of the Regulation, the expression 'employed persons' covers only employed persons who satisfy the definition resulting from the combined provisions of Article 1(a)(ii) and the Annex. Furthermore, consideration of the questions referred has not disclosed any factor such as to cast doubt on the validity of the Annex. However, Article 48(2) of the Treaty must be interpreted as precluding the application of national legislation which results in an employed person whose children are resident in another Member State being refused family benefits in respect of full calendar months falling within an extended period of unpaid leave, where employed persons whose children are resident in the Member State concerned are entitled to such benefits.

## Decision on costs

### Costs

**38** The costs incurred by the German and Spanish Governments, by the Council of the European Union and by 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.

### Operative part

On those grounds,

THE COURT

(Sixth Chamber),

in answer to the questions referred to it by the Bundessozialgericht by order of 20 June 1995, hereby rules:

For the purposes of paying family benefits under German legislation in accordance with 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, the expression 'employed persons' covers only employed persons who satisfy the definition resulting from the combined provisions of Article 1(a)(ii) of the Regulation and Point I C of Annex I thereto. Furthermore, consideration of the questions referred has not disclosed any factor such as to cast doubt on the validity of the said annex. However, Article 48(2) of the EC Treaty must be interpreted as precluding the application of national legislation which results in an employed person whose children reside in another Member State being refused family benefits in respect of full calendar months falling within an extended period of unpaid leave, where employed persons whose children are resident in the Member State concerned are entitled to such benefits.