

## JUDGMENT OF THE COURT (Third Chamber)

27 February 2014 (\*)

(Social security – Regulation (EEC) No 1408/71 – Family allowances – Articles 77 and 78 – Benefits for dependent children of pensioners and for orphans – Regulation (EC) No 883/2004 – Family benefits – Article 67 – Family members residing in another Member State – Concept of ‘pension’ – Recipient of a pension granted, pursuant to German legislation, for bringing up children following the death of the person from whom that recipient was divorced (‘Erziehungsrente’))

In Case C-32/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Sozialgericht Nürnberg (Germany), made by decision of 28 December 2012, received at the Court on 22 January 2013, in the proceedings

**Petra Würker**

v

**Familienkasse Nürnberg,**

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, C.G. Fernlund, A. Ó Caoimh (Rapporteur), C. Toader and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the German Government, by T. Henze and J. Möller, acting as Agents,
- the European Commission, by V. Kreuzschatz, acting as Agent,

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

gives the following

### Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 77 and 78 of Regulation (EEC) No 1408/71 of the Council 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 (OJ 1997 L 28, p. 1, as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008 (OJ 2008 L 177, p. 1; 'Regulation No 1408/71'), and of Article 67 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EC) No 988/2009 of the European Parliament and of the Council of 16 September 2009 (OJ 2009 L 284, p. 43; 'Regulation No 883/2004').

- 2 The request has been made in proceedings between Ms Würker and the Familienkasse Nürnberg (Family Allowances Office, Nuremberg, 'the Familienkasse') concerning the latter's refusal to pay her child allowances.

### Legal context

#### *European Union law*

#### Regulation No 1408/71

- 3 Article 1(u) of Regulation No 1408/71 provides that, for the purposes of its application:
- '(i) the term *family benefits* means all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4 (1) (h), excluding the special childbirth or adoption allowances referred to in Annex II;
  - (ii) *family allowances* means periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family'.
- 4 In the words of Article 4(1)(h) of that regulation, the regulation is to apply to 'all legislation concerning the following branches of social security ... family benefits'.
- 5 Under Title III of that regulation, entitled 'Special provisions relating to the various categories of benefits', Chapter 3, which contains Articles 44 to 51a, is entitled 'Old age and death (pensions)', and Chapter 8, which includes Article 77 to 79a, is entitled 'Benefits for dependent children of pensioners and for orphans'.
- 6 Article 77 of Regulation No 1408/71, entitled 'Dependent children of pensioners', provides:
- '1. The term "benefits", for the purposes of this Article, shall mean family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases.
  - 2. Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children are residing:
    - (a) to a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension;
    - ...
- 7 Article 78 of that regulation, entitled 'Orphans', is worded as follows:

‘1. The term “benefits”, for the purposes of this Article, means family allowances and, where appropriate, supplementary or special allowances for orphans ...

2. Orphans’ benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the orphan or the natural or legal person actually maintaining him is resident:

- (a) for the orphan of a deceased employed or self-employed person who was subject to the legislation of one Member State only in accordance with the legislation of that State;
- (b) for the orphan of a deceased employed or self-employed person who was subject to the legislation of several Member States:

...’

8 The first subparagraph of Article 79(1) of Regulation No 1408/71, entitled ‘Provisions common to benefits for dependent children of pensioners and for orphans’, provides:

‘Benefits, within the meaning of Articles 77 and 78, shall be provided in accordance with the legislation determined by applying the provisions of those Articles by the institution responsible for administering such legislation and at its expense as if the pensioner or the deceased had been subject only to the legislation of the competent State.’

Regulation No 883/2004

9 Regulation No 1408/71 was replaced by Regulation No 883/2004, which, in accordance with Article 91 thereof and with Article 97 of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1), became applicable on 1 May 2010, the date from which Regulation No 1408/71 was repealed.

10 Recital 34 in the preamble to Regulation No 883/2004 states:

‘Since family benefits have a very broad scope, affording protection in situations which could be described as classic as well as in others which are specific in nature ... it is necessary to regulate all such benefits.’

11 Article 1 of Regulation No 883/2004 provides:

‘For the purposes of this Regulation,

...

- (w) “pension” covers not only pensions but also lump-sum benefits which can be substituted for them and payments in the form of reimbursement of contributions and, subject to the provisions of Title III, revaluation increases or supplementary allowances;

...

- (z) “family benefit” means all benefits in kind or in cash intended to meet family expenses, excluding advances of maintenance payments and special childbirth and adoption allowances mentioned in Annex I.’

12 Article 67 of that regulation reads as follows:

‘A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his pension.’

*German law*

13 Entitlement to child allowance is based on the Federal Law on child allowance (Bundeskindergeldgesetz).

14 The Law on income tax (Einkommensteuergesetz) makes receipt of child allowance conditional on the beneficiary’s being fully liable to tax in Germany and therefore, according to the referring court, conditional on the beneficiary’s having his residence in that Member State.

15 Under Paragraph 47(1) of Book VI of the Social Security Code (Sozialgesetzbuch, Sechstes Buch, ‘the SGB VI’), insured persons are entitled to a pension for bringing up children until they reach normal retirement age if:

- their marriage was dissolved after 30 June 1977 and the person from whom they were divorced (‘the former spouse’) has died;
- they are bringing up their own child or a child of the deceased former spouse (age limit: 18 years);
- they have not remarried; and
- on the date of the ex-spouse’s death, they have completed the normal qualifying period.

16 The referring court states that, pursuant to German law, the pension for bringing up children is in the nature of a survivor’s pension (pension on account of death).

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

17 Ms Würker, a German national born on 24 February 1963, receives, following the death on 4 December 1991 of her former spouse with whom she had a child, Diana, a pension for bringing up children under Paragraph 47(1) of the SGB VI.

18 Since 1 September 2008 Ms Würker has lived in Sweden with her two other children, Laura and Chris, and their father, without being married to him.

19 According to the referring court, even though Diana has reached the age of 18, Ms Würker is entitled, under Paragraph 47(1) of the SGB VI, to a pension for bringing up children in respect of Laura and Chris, born on 24 March 1995 and 15 November 1997, respectively.

20 It is apparent from the file before the Court that the Swedish authorities, taking account in particular of Ms Würker’s receipt of that pension provided for by the SGB VI, have rejected her application for the grant of the family allowances provided for by the Swedish legislation.

- 21 According to the order for reference, it is furthermore established between the parties to the main proceedings that since 1 September 2008 Ms Würker has no longer been entitled to child allowance in accordance with the Law on income tax. By decision of 11 January 2010, the Family Allowances Office, Plauen (Germany) rejected Ms Würker's application for the grant of that allowance because she was not resident, and subject to income tax, in Germany. That decision has become final.
- 22 By decision of 7 September 2010, the Familienkasse confirmed the rejection, of 22 February 2010, of Ms Würker's application for the grant of child allowance for her children Laura and Chris as from the date she moved to Sweden. That decision was based on the facts that, first, Ms Würker was not in receipt of any pension of the type of those referred to in Article 77 of Regulation No 1408/71 and, second, that Article 78 of that regulation does not confer entitlement to that allowance on the children concerned, because they are not the children of Ms Würker's deceased former spouse.
- 23 It is against that decision that the action in the main proceedings is brought. According to the referring court, the subject-matter of the case before it is entitlement to child allowance based on the Law on child allowance, read together with the rules on the coordination of social security systems at EU level.
- 24 In response to a question asked by that court, the Familienkasse took the view that Ms Würker was not entitled to child allowance under Regulation No 883/2004, which replaced Regulation No 1408/71 from 1 May 2010, either.
- 25 For the period from September 2008 to April 2010, the referring court indicates that it is inclined to follow the approach of the Familienkasse. In contrast, for the period as from 1 May 2010, that court finds that entitlement to family benefits on the basis of the German legislation is substantiated on the basis of Article 67 of Regulation No 883/2004.
- 26 In those circumstances, the Sozialgericht Nürnberg decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
- (1) Must Articles 77 or 78 of Regulation ... No 1408/71 be interpreted as meaning that receipt of a pension for bringing up children ("Erziehungsrente") confers a right against the Member State that pays the pension?
- (2) Has the situation changed since 1 May 2010 with the entry into force of Regulation ... No 883/2004 and must Article 67 of that regulation be interpreted as meaning that any type of pension (including a German pension for bringing up children) confers [that] right?

### **Consideration of the questions referred**

#### *The first question*

- 27 It must be borne in mind that, under Articles 77(2)(a) and 78(2)(a) of Regulation No 1408/71, where persons receiving pensions for old age, invalidity or an accident at work or occupational disease were, or the deceased employed worker was, subject to the legislation of one Member State only, family benefit is granted according to the legislation of that Member State. Under the first subparagraph of Article 79(1) of that regulation, those benefits are to be provided in accordance with the legislation by the institution responsible for applying that legislation and at its expense.

- 28 According to the case-law, the ‘family allowances’ for which Articles 77 and 78 of Regulation No 1408/71 provide payment, are solely those benefits that match the definition in Article 1(u)(ii) of that regulation, to the exclusion of any other family benefit for dependent children (see, to that effect, Case C-225/10 *Pérez García and Others* [2011] ECR I-10111, paragraph 31 and the case-law cited).
- 29 In the present case, it is established that the child allowance provided for by the German legislation meets that definition and that it is, therefore, capable of falling within the ambit of Articles 77 and 78 of Regulation No 1408/71 (see, to that effect, *Pérez García and Others*, paragraph 33).
- 30 In that regard, it must, however, be borne in mind that, in accordance with its very wording, the first subparagraph of Article 78(2)(a) and (b) of Regulation No 1408/71 governs only the right to benefits for the ‘orphan of a deceased employed person’ (see Case 1/88 *Baldi* [1989] ECR 667, paragraph 15, and Case C-619/11 *Dumont de Chassart* [2013] ECR, paragraph 35).
- 31 It is apparent from the information provided to the Court that, although Ms Würker continues to be eligible for the pension for bringing up children provided for by the SGB VI for her children Laura and Chris, they are not the children of the deceased.
- 32 It follows that such a pension does not fall within the ambit of Article 78 of Regulation No 1408/71.
- 33 As for Article 77(1) of Regulation No 1408/71, it is apparent from its very wording that that provision covers only persons receiving ‘pensions or annuities for old age, invalidity or an accident at work or occupational disease’.
- 34 In a case such as that in the main proceedings, it is therefore only where a benefit such as the pension for bringing up children provided for by the SGB VI could, notwithstanding its wording, be treated in the same way as one of the categories of pensions listed in Article 77(1) that it would be for the German authorities, as the authorities responsible for paying that pension, to grant Ms Würker the family allowances for her children Laura and Chris.
- 35 In those circumstances, it must be considered that by its first question, the referring court asks whether, on a proper construction of Article 77(1) of Regulation No 1408/71, a benefit such as the pension for bringing up children provided for in Paragraph 47(1) of the SGB VI, which is granted, in the event of death, to the former spouse of the deceased for the purposes of bringing up the children of that former spouse, may be treated in the same way as ‘pensions for old age, invalidity or an accident at work or occupational disease’ within the meaning of that provision of that regulation.
- 36 According to the case-law of the Court, the classification of a benefit in the general scheme of Regulation No 1408/71 is based essentially on the constituent elements of that benefit, in particular its purposes and the conditions on which it is granted, and not on the classification which is made by the national legislation (see, by analogy with the distinction between benefits excluded from the scope of Regulation No 1408/71 and benefits which fall within it, inter alia, Case 9/78 *Directeur régional de la Sécurité sociale de Nancy* [1978] ECR 1661, paragraph 12; Case C-160/96 *Molenaar* [1998] ECR I-843, paragraph 19; and Case C-177/12 *Lachheb* [2013] ECR, paragraph 28).
- 37 First of all it must be stated that, as is apparent from paragraph 15 of the present judgment, the pension for bringing up children provided for in Paragraph 47(1) of the SGB VI does not

require an accident at work or occupational disease or physical, mental or psychological injury hindering the pursuit of a professional activity by the person entitled.

- 38 It is apparent from the file before the Court, in particular from the observations of the German Government, that the pension for bringing up children, established on 1 July 1977, has its origins in the reform of the German law on marriage and the family in the context of which, first, as regards divorce, the 'principle of fault' was replaced by the 'principle of the failure of the marriage' and, second, the right to maintenance after divorce was separated, in principle, from responsibility for the failure of the marriage. In the context of that reform, the pension for bringing up children is intended to fill any gaps as regards cover that could appear, to the detriment of the surviving former spouse, between the 'compensatory splitting of pension rights', the introduction of which caused the survivor's pension hitherto granted to a surviving divorced spouse to lapse, and the maintenance of the divorced spouse.
- 39 As is apparent from paragraph 15 above, that pension for bringing up children presupposes the death of a former spouse. According to the explanations provided by the German Government, that pension is intended to compensate the right to receive a maintenance payment linked to responsibility for a dependent child, which ended with that death, and to prevent the surviving parent being constrained to work when that is not in the interests of the child.
- 40 It is also apparent from the information provided to the Court that, until 1991, entitlement to receive the pension for bringing up children was conferred only if the surviving spouse was responsible for bringing up a child who could claim an orphan's pension. Since 1992, the class of persons able to claim the benefit of that pension has, however, been extended, so that entitlement to that pension because of the death of the former spouse could be conferred even when a child is the result, as in the case in the main proceedings, of a new relationship of the person entitled.
- 41 Furthermore, it is apparent from the explanations provided by the German Government that entitlement to the pension for bringing up children is conferred irrespective of any condition that the person entitled should have reached a minimum age, and that the fact of reaching the normal retirement age laid down by the German legislation extinguishes that entitlement, the latter then being replaced by the old age pension.
- 42 Taking account of the foregoing, it is to be considered that a benefit such as the pension for bringing up children laid down by the SGB VI presents the characteristics of a pension paid in the event of death, such as a survivor's pension, rather than those of one of the categories of pension specifically listed in Article 77(1) of Regulation No 1408/71, namely, pensions or annuities 'for old age, invalidity or an accident at work or occupational disease'.
- 43 It follows that a benefit, such as the pension for bringing up children provided for in Paragraph 47(1) of the SGB VI, is not to be treated in the same way as one of the categories of pensions listed in Article 77(1).
- 44 The fact, noted by the referring court, that that pension for bringing up children contains essential elements of a pension acquired on the basis of an insured person's own qualifying period as an employee under the German social security scheme, does not call that conclusion into question (see, by analogy, Case C-43/99 *Leclere and Deaconescu* [2001] ECR I-4265, paragraph 50).
- 45 In the light of the foregoing, the answer to the first question is that, on a proper construction of Article 77(1) of Regulation No 1408/71, a benefit such as the pension for bringing up children provided for in Paragraph 47(1) of the SGB VI, which is granted, in the event of

death, to the former spouse of the deceased for the purposes of bringing up the children of that former spouse, cannot be treated in the same way as 'pensions for old age, invalidity or an accident at work or occupational disease' within the meaning of Article 77 of Regulation No 1408/71.

*The second question*

- 46 Having regard to the reply given to the first question, the second question must be understood as seeking to determine whether, on a proper construction of Article 67 of Regulation No 883/2004, a benefit such as the pension for bringing up children provided for in Paragraph 47(1) of the SGB VI is covered by the concept of 'pension' within the meaning of Article 67.
- 47 In that regard, it must be noted that that last provision is included in Chapter 8, entitled 'Family benefits', of Title III to Regulation No 883/2004. That chapter deals with the benefits listed previously in Chapters 7 and 8, Title III, of Regulation No 1408/71.
- 48 On the basis of the new definition of the phrase 'family benefits', set out in Article 1(z) of Regulation No 883/2004, the distinction drawn in the context of the application of Regulation No 1408/71 between 'family allowances' and 'family benefits', recalled at paragraph 29 above, is not intended to apply to situations falling within the ambit of Regulation No 883/2004, the latter seeking, in accordance with recital 34 thereof, to regulate all such family benefits since they have a very broad scope.
- 49 As is apparent from its very title, Article 67 of Regulation No 883/2004 concerns the payment of family benefits, in particular in the case of 'family members residing in another Member State'. The last sentence of that article contains a special rule under which, in such a case, 'a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his pension'.
- 50 It must be observed that the application of that provision, unlike that of Article 77(1) of Regulation No 1408/71, is not limited to persons receiving certain categories of pensions or annuities.
- 51 The definition of the word 'pension', set out in Article 1(w) of Regulation No 883/2004 includes, besides pensions linked to the previous pursuit of a salaried or non-salaried occupation, such as those that were referred to in Article 77(1) of Regulation No 1408/71, pensions paid in the event of death, like the pension for bringing up children provided for in the SGB VI.
- 52 It follows that a situation such as that of Ms Würker, who receives a pension for bringing up children, falls within the ambit of Article 67 of Regulation No 883/2004.
- 53 In the light of the foregoing, the answer to the second question is that, on a proper construction of Article 67 of Regulation No 883/2004, a benefit such as the pension for bringing up children provided for in Paragraph 47(1) of the SGB VI is covered by the concept of 'pension' within the meaning of Article 67.

**Costs**

- 54 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 (Third Chamber) hereby rules:

1. **On a proper construction of Article 77(1) of Regulation (EEC) No 1408/71 of the Council 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, as amended by Regulation (EC) No 592/2008 of the European Parliament and of the Council of 17 June 2008, a benefit such as the pension for bringing up children provided for in Paragraph 47(1) of Book VI of the Social Security Code (Sozialgesetzbuch, Sechstes Buch), which is granted, in the event of death, to the former spouse of the deceased for the purposes of bringing up the children of that former spouse, cannot be treated in the same way as ‘pensions for old age, invalidity or an accident at work or occupational disease’ within the meaning of Article 77 of Regulation (EEC) No 1408/71.**
2. **On a proper construction of Article 67 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems, a benefit such as the pension for bringing up children provided for in Paragraph 47(1) of Book VI of the Social Security Code is covered by the concept of ‘pension’ within the meaning of Article 67.**

[Signatures]

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\* Language of the case: German.