JUDGMENT OF THE COURT (Fifth Chamber)

23 November 2000 *

In Case C-135/99,

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

Ursula Elsen

and

Bundesversicherungsanstalt für Angestellte,

on the interpretation of Article 51 of the EC Treaty (now, after amendment, Article 42 EC) and 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 at the material time, in particular by Council Regulation (EEC) No 2195/91 of 25 June 1991 (OJ 1991 L 206, p. 2),

* Language of the case: German.

THE COURT (Fifth Chamber),

composed of: A. La Pergola, President of the Chamber, M. Wathelet (Rapporteur) and D.A.O. Edward, Judges,

Advocate General: A. Saggio,
Registrar: R. Grass,

after considering the written observations submitted on behalf of:

— the German Government, by W.-D. Plessing, Ministerialrat in the Federal Ministry for Economic Affairs, and C.-D. Quassowski, Regierungsdirektor in the same Ministry, acting as Agents,

— the Spanish Government, by M. López-Monís Gallego, Abogado del Estado, acting as Agent,

— the Commission of the European Communities, by P. Hillenkamp, Legal Adviser, acting as Agent, and R. Karpenstein, Rechtsanwalt, Hamburg,

having regard to the report of the Judge-Rapporteur,

after hearing the Opinion of the Advocate General at the sitting on 13 April 2000,

gives the following

Judgment

1 By order of 24 February 1999, received at the Court on 19 April 1999, the Bundessozialgericht 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 Article 51 of the EC Treaty (now, after amendment, Article 42 EC) and 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, hereinafter 'Regulation No 1408/71'), as amended in particular, at the material time, by Council Regulation (EEC) No 2195/91 of 25 June 1991 (OJ 1991 L 206, p. 2).

2 The question has been raised in proceedings between Mrs Ursula Elsen and the Bundesversicherungsanstalt für Angestellte (Federal Insurance Office for Employed Persons, hereinafter 'the Bundesversicherungsanstalt') concerning the latter's refusal to treat the period during which she raised her child in France as equivalent to the period devoted to child-rearing ('Kindererziehungszeit'), within the meaning of the German social security legislation, for the purposes of the grant of an old-age benefit.

National legislation

3 Paragraph 56(1) of Book VI of the Sozialgesetzbuch of 18 December 1989 (hereinafter 'SGB VI'), in the version applicable at the material time, provided:

'Compulsory statutory old-age insurance contributions shall be deemed to be paid for the periods spent rearing a child corresponding to the child's first three years. A period spent rearing a child shall be credited to one of the parents if...

1. the period spent rearing the child is to be attributed to that parent,

2. the child-rearing took place in the Federal Republic of Germany or can be treated as having taken place there and

3. that parent is not barred from being credited with that period.'

4 For children born before 1 January 1992, Paragraph 249 of the SGB VI reduces from three years to twelve months the periods of contribution to be taken into consideration.

5 As regards periods of child-rearing completed abroad, the second sentence of Paragraph 56(3) provides:

'A period of child-rearing shall be treated as child-rearing in the Federal Republic of Germany where the child-rearing parent has habitually resided abroad with his or her child and during the period devoted to child-rearing or immediately before the birth of the child has completed periods of compulsory contributions in respect of an activity carried on there as an employed or self-employed person.'

6 Furthermore, Paragraph 57 of the SGB VI provides:

'The period devoted to rearing a child until the end of the child's tenth year shall constitute a period to be taken into consideration for one of the parents if the conditions for attribution of a period of child-rearing are also fulfilled during that period.'

7 Moreover, Paragraph 6 of the Mutterschutzgesetz (Protection of Mothers Law, in the version published on 17 January 1997, BGBl. I, p. 22, hereinafter 'the MuSchG') provides:

'Women who have given birth shall not be employed during the eight weeks following confinement.'

8 Under Paragraph 1 of the MuSchG, however, Paragraph 6 applies only to persons in gainful employment.

9 Finally, under Paragraph 15 of the Bundeserziehungsgeldgesetz (Federal Child-rearing Allowance Law, hereinafter 'the BErzGG'), employed persons are entitled to parental leave 'until a child born after 31 December 1991 has reached the age of three years,

1. where they live in the same household with a dependent child... and

2. where they themselves care for and rear the child...'.

Community law

10 Article 3(1) of Regulation No 1408/71 lays down the principle of equal treatment:

'Subject to the special provisions of this Regulation, persons resident in the territory of one of the Member States to whom this Regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

11 Under the first paragraph of Article 10(1) of that regulation:

'Save as otherwise provided in this Regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'

12 Point 19 of Section C, setting out special rules for the application of the legislation of certain Member States, of Annex VI to Regulation No 1408/71, as inserted by Regulation No 2195/91, provides, in respect of Germany:

'A period of insurance for child-rearing under German legislation is valid even for a period during which the employed person concerned brought up the child in another Member State provided that person was unable to engage in occupational activity by virtue of Paragraph 6(1) of the Protection of Mothers Law (Mutterschutzgesetz) or took parental leave under Article 15 of the Federal Child-rearing Allowance Law (Bundeserziehungsgeldgesetz) and did not engage in any minor (geringfügig) employment within the meaning of Paragraph 8 of SGB IV.'

13 Pursuant to Article 1(12)(b)(v) of Regulation No 2195/91, point 19 did not take effect until 1 January 1986.

Main proceedings

14 In May 1981 Mrs Elsen, who is of German nationality, moved from Germany to France, where since then she has lived with her husband and their son, born in August 1984.

15 Until March 1985, she had a gainful occupation subject to compulsory insurance in Germany, and after transferring her residence to France she acquired the status of frontier worker. Her occupational activity was interrupted between July 1984 and February 1985 owing to maternity leave for the birth of her child. After March 1985, Mrs Elsen no longer engaged in an occupational activity subject to compulsory insurance in either Germany or France.

16 In September 1994, Mrs Elsen requested the Bundesversicherungsanstalt to take into consideration, as periods of insurance for the purpose of an old-age pension, the periods spent rearing her son, pursuant to Paragraph 56(1) in conjunction with Paragraph 249 of the SGB VI (a period of 12 months) and Paragraph 57 of the SGB VI (a period of 10 years), in other words the child's first 10 years.

17 That request was refused by decision of 12 September 1995 of the Bundesversicherungsanstalt, which was confirmed by a decision of 21 August 1996 rejecting Mrs Elsen's complaint, on the ground that the child-rearing had taken place abroad and the conditions on which it might be treated as child-rearing in Germany referred to in Paragraph 56(3) had not been fulfilled.

18 Mrs Elsen brought an action against the final decision refusing her request. That action was rejected by judgment of 11 August 1997 of the Sozialgericht Berlin (Germany). She then lodged an appeal on points of law with the Bundessozialgericht.

The question referred to the Court

19 The Bundessozialgericht found that Mrs Elsen did not satisfy the conditions laid down in the relevant national provisions on which the periods devoted to rearing her child could be taken into account. The child-rearing in question could not be treated as child-rearing in the national territory since the parent concerned could not provide proof of periods of compulsory contribution, under German legislation, during the period devoted to child-rearing or immediately before the birth of the child, in respect of an activity as an employed person or a self-employed person exercised abroad, as provided for in the second sentence of Paragraph 56(3) of the SGB VI. While it accepted that the system in question was territorial in nature, the national court also found that Mrs Elsen did not fulfil the conditions for attribution of the periods devoted to child-rearing under the French legislation either, which required that the person concerned must have previously worked in French territory.

20 As regards point 19 of Annex VI, Section C, to Regulation No 1408/71, as inserted by Regulation No 2195/91, the Bundessozialgericht observed that that provision did not apply to the plaintiff. First, it did not take effect until 1 January 1986, whereas the period of child-rearing in the present case preceded that date. Second, even if that fact were disregarded, Paragraph 6 of the MuSchG would be applicable, by virtue of Paragraph 1 of that Law, only to persons exercising an occupational activity, which was the plaintiff's case only until March 1985, and it has only been possible to take parental leave in accordance with Paragraph 15 of the BErzGG since 1 January 1986, the date on which that Law entered into force.

21 Being uncertain as to whether the refusal to take periods devoted to child-rearing into account on the ground that the claimant has established her residence in another Member State was compatible with Community law, the Bundessozial-

gericht decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Does European law require a period of child-rearing under German law prior to 1 January 1986 to be taken into account if the child was in fact raised in another Member State (in this case France) but the parent who brought up the child was a cross-border worker in employment subject to compulsory insurance in the Federal Republic of Germany until the start of the maternal protection period and also after the end of her maternity leave?'

22 By its question, the Bundessozialgericht is asking essentially whether Community law requires that, for the purpose of the grant of an old-age pension, the competent institution of a Member State take into account, as though they had been completed in its national territory, periods devoted to child-rearing completed in another Member State by a person who, at the time when the child was born, was a frontier worker employed in the territory of the first Member State and residing in the territory of the second Member State.

23 Before answering that question, it is necessary to ascertain whether, under Regulation No 1408/71, the German legislation is actually applicable to the situation of a worker who has ceased all occupational activity in Germany and resides in another Member State, for the purpose of taking into account periods devoted to rearing a child born while the parent was still working in Germany as a frontier worker.

24 The Commission submits that, during the periods at issue in the main proceedings, immediately after the birth of the child, Mrs Elsen was subject to the social security legislation of the French Republic, where she was living, since during those periods she was not working in Germany and there was not a

sufficiently close link with the German social security system for a derogation from the principle of territoriality characteristic of that system to be justified in the interest of equal treatment.

25 In response to that submission, the Court observes that, pursuant to Article 13(2)(a) and (b) of Regulation No 1408/71, a person employed or self-employed in the territory of one Member State is subject to the social security legislation of that Member State even if he resides in the territory of another Member State.

26 Admittedly, in the present case, although the plaintiff had a gainful occupation in Germany until March 1985, when she resided with her family in France, she has not worked since that date. However, it must be pointed out that, as regards the taking into account, for the purposes of old-age insurance, of unbroken periods of child-rearing following the birth of her child, Mrs Elsen worked exclusively in Germany and was subject, as a frontier worker, to the German legislation when the child was born. Thus a close link can be established between the periods of child-rearing concerned and the periods of insurance completed in Germany by virtue of her occupational activity in that State. It is precisely because she had completed the latter periods that Mrs Elsen requested the German institution to take into account the subsequent periods devoted to rearing her child.

27 Consequently, it must be held — and the German Government has not disputed this point — that the German legislation is applicable in the plaintiff's situation.

28 In those circumstances, as regards the attribution of those periods of child-rearing for the purposes of old-age insurance, Mrs Elsen cannot be regarded under Article 13(2)(f) of Regulation No 1408/71 as having ceased all occupational

activity and subject for that reason to the legislation of the State in which she resided. That provision specifically provides for the legislation of the State of residence to apply only where 'the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs'. As regards the attribution of periods devoted to rearing a child born at a time when, as here, the parent pursued an occupation in a Member State and was therefore subject to the social security legislation of that State, that legislation remains applicable, in accordance with Article 13(2)(a) of Regulation No 1408/71.

29 Since it has thus been established that the German legislation is applicable in the present case, it is therefore necessary to determine the compatibility with Community law of provisions of a Member State, such as those set out in Paragraph 56(1) and (3) of the SGB VI, which make attribution of periods devoted to child-rearing subject to the condition that the child-rearing took place in the national territory or, where it took place in the territory of another Member State, to the condition that the parent who reared the child pursued an occupation in the territory of that other State, giving rise to payment of compulsory contributions under the insurance scheme of the first State.

30 The German Government and the Commission submit that it is compatible with Community law for the German legislation to require that, in order to be credited with periods of child-rearing, the person concerned should maintain a link with the national insurance scheme, for example by actually taking maternity leave or parental leave as provided for by the MuSchG or the BErzGG respectively. In the plaintiff's case, they say, no such link exists.

31 The Commission recognises that the fact that the French legislation makes no provision for periods devoted to rearing a child to be taken into account in a manner comparable to the German provisions has unfortunate consequences. In its view, however, only the Community legislature can mitigate those consequences.

32 The Spanish Government, on the other hand, submits that the principle of territoriality, which forms the basis of the German legislation at issue in the main proceedings, is contrary to the purpose of Community social security law. It refers to the principle of equal treatment of situations laid down in the case-law of the Court, the essential aim of which is to ensure that situations occurring in one Member State are treated in the same way as if they had occurred in another Member State whose legislation is applicable to the actual case, so that a Community worker is not deterred from exercising his right to free movement, which would impede that freedom (see, in that regard, Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489 and Case C-131/96 *Mora Romero* v *Landesversicherungsanstalt Rheinprovinz* [1997] ECR I-3659). By virtue of that principle the German authorities are under an obligation, for the purposes of the application of the old-age insurance scheme, to take into account periods of child-rearing completed in another Member State as though they had been completed in Germany.

33 In that regard, without its being necessary to consider the scope, the applicability and, if need be, the validity of point 19 of Annex VI, section C, of Regulation No 1408/71, as inserted by Regulation No 2195/91, it is sufficient to point out that, although Member States retain the power to organise their social security schemes, they must none the less, when exercising that power, comply with Community law and, in particular, the Treaty provisions on freedom of movement for workers (see, in particular, Case C-120/95 *Decker* v *Caisse de Maladie des Employés Privés* [1998] ECR I-1831, paragraph 23, and Case C-158/96 *Kohll* v *Union des Caisses de Maladie* [1998] ECR I-1931, paragraph 19) or again the freedom of every citizen of the Union to move and reside in the territory of the Member States.

34 Provisions such as those at issue in the main proceedings are disadvantageous to Community nationals who have exercised their right to move and reside freely in the Member States, as guaranteed in Article 8a of the EC Treaty (now, after amendment, Article 18 EC). By transferring his residence to another Member State while continuing to work in Germany, a Community national would (under the legislation of that State) automatically lose credit for periods of child-rearing completed in the State of residence.

35 Furthermore, Regulation No 1408/71 itself, which was adopted on the basis, *inter alia*, of Article 51 of the EC Treaty (now, after amendment, Article 42 EC), contains a number of provisions designed to ensure that social security benefits are payable by the competent State, even where the insured, who has worked exclusively in his State of origin, resides in or transfers his residence to another Member State. Those provisions undoubtedly help to ensure freedom of movement not only for workers, under Article 48 of the EC Treaty (now, after amendment, Article 39 EC), but also for citizens of the Union, within the Community, under Article 8a of the Treaty.

36 In the light of the foregoing, the answer to be given to the question referred to the Court must be that Articles 8a, 48 and 51 of the Treaty require that, for the purpose of the grant of an old-age pension, the competent institution of a Member State take into account, as though they had been completed in the national territory, periods devoted to child-rearing completed in another Member State by a person who, at the time when the child was born, was a frontier worker employed in the territory of the first Member State and residing in the territory of the second Member State.

Costs

37 The costs incurred by the German and Spanish Governments and 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 (Fifth Chamber),

in answer to the question referred to it by the Bundessozialgericht by order of 24 February 1999, hereby rules:

Articles 8a, 48 and 51 of the EC Treaty (now, after amendment, Articles 18 EC, 39 EC and 42 EC) require that, for the purpose of the grant of an old-age pension, the competent institution of a Member State take into account, as though they had been completed in national territory, periods devoted to child-rearing completed in another Member State by a person who, at the time when the child was born, was a frontier worker employed in the territory of the first Member State and residing in the territory of the second Member State.

La Pergola Wathelet Edward

Delivered in open court in Luxembourg on 23 November 2000.

R. Grass

Registrar

A. La Pergola

President of the Fifth Chamber