

JUDGMENT OF THE COURT (First Chamber)
20 January 2005 *

In Case C-302/02,

REFERENCE for a preliminary ruling under Article 234 EC from the Oberster Gerichtshof (Austria), made by decision of 11 July 2002, received at the Court on 26 August 2002, in the proceedings brought on behalf of

Nils Laurin Effing

THE COURT (First Chamber),

composed of P. Jann, President of the Chamber, A. Rosas, K. Lenaerts, S. von Bahr and K. Schiemann (Rapporteur), Judges,

Advocate General: J. Kokott,
Registrar: R. Grass,

* Language of the case: German.

having regard to the written procedure,

having regard to the decision, after hearing the Advocate General, to proceed to judgment without a hearing,

after considering the observations submitted on behalf of:

- the Austrian Government, by E. Riedl, acting as Agent,
- the German Government, by W.-D. Plessing and A. Tiemann, acting as Agents,
- the Commission of the European Communities, by H. Michard and H. Kreppel, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 25 May 2004,

gives the following

Judgment

- 1 The reference for a preliminary ruling concerns the interpretation of Article 12 EC in conjunction with Article 3 of Council Regulation (EEC) No 1408/71 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 by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001 (OJ 2001 L 187, p. 1) ('Regulation No 1408/71').

- 2 The reference was made in the context of proceedings brought on behalf of Nils Laurin Effing ('the claimant'), a minor, concerning his entitlement to continue receiving advances on maintenance payments.

Legal framework

Community legislation

Regulation No 1408/71

- 3 The aim of Regulation No 1408/71 is to coordinate, in the context of the free movement of persons, national social security legislation, in accordance with the objectives of Article 42 EC.
- 4 Article 2(1) of that regulation provides:

'This Regulation shall apply to employed or self-employed persons and to students 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 or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.’

5 Article 3(1) of Regulation No 1408/71, concerning equality of treatment, provides:

‘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 the State.’

6 Article 4(1)(h) of that same regulation, which defines its scope *ratione materiae*, states:

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

...

(h) family benefits.’

- 7 Article 13(2) of Regulation No 1408/71 provides as follows with respect to the determination of the legislation applicable:

‘Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be 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;

(b) a person who is self-employed in the territory of one Member State shall be subjected to the legislation of that State even if he resides in the territory of another Member State;

...

(f) a person to whom 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 foregoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.’

- 8 Article 73 of Regulation No 1408/71, entitled 'Employed or self-employed persons the members of whose families reside in a Member State other than the competent Member State', is worded as follows:

'An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the 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, subject to the provisions of Annex VI.'

- 9 Article 74 of that same regulation, entitled 'Unemployed persons the members of whose families reside in a Member State other than the competent Member State', provides as follows:

'An unemployed person who was formerly employed or self-employed and who draws unemployment benefits under the legislation of a Member State shall be entitled, in respect of the members of his family 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, subject to the provisions of Annex VI.'

National legislation

- 10 The Österreichisches Bundesgesetz über die Gewährung von Vorschüssen auf den Unterhalt von Kindern (Unterhaltsvorschußgesetz) (Austrian Federal Law on the Grant of Advances for the Maintenance of Children, BGBl. 1985, No 451, 'the UVG'), provides for the grant by the State of advances on maintenance payments.

- 11 Under Paragraph 3 of the UVG the grant of such advances is, in principle, contingent on the existence of an executory order in the national territory. However, Paragraph 4 of the UVG provides that, in certain circumstances, advances are to be granted even where enforcement of the obligation to make maintenance payments appears to have no prospect of success or where no entitlement to maintenance has been determined. Thus, Paragraph 4(3) of the UVG provides that advances are also to be granted:

‘3. where the debtor of the maintenance obligation is deprived of his freedom in the national territory for a period of over one month due to a judicial decision in criminal proceedings and cannot, for that reason, satisfy his obligations’.

The Convention on the Transfer of Sentenced Persons

- 12 Under the Convention on the Transfer of Sentenced Persons, opened for signature on 21 March 1983 in Strasbourg (‘the Convention’) and to which declarations of the Republic of Austria have been attached (BGBl. I, 1986, No 524), and Paragraph 76 of the Auslieferungs- und Rechtshilfegesetz (Law applicable in matters of extradition and judicial assistance, ARGH, BGBl. I, 1979, No 529), persons sentenced in the territory of a State signatory to the Convention (sentencing State) may, pursuant to Article 2 thereof, ask to be transferred to their State of origin (administering State) in order to serve the sentence which has been imposed upon them. In so doing, pursuant to Article 9(1)(b) of the Convention, a sanction prescribed by the law of the administering State for the same offence may be substituted for the sanction imposed in the sentencing State.
- 13 According to the Convention’s recitals, the purpose of such a transfer is inter alia to further the social rehabilitation of sentenced persons, by allowing foreigners who are deprived of their liberty as a result of their commission of a criminal offence to serve their sentences within their own society.

- 14 Since the Convention entered into force in Ireland on 1 November 1995, it has bound all the Member States. It entered into force in Austria on 1 January 1987 and in Germany on 1 February 1992 and was also ratified by the 10 new Member States.

The main proceedings and the question referred for a preliminary ruling

- 15 In the main proceedings, the claimant, Nils Laurin Effing, contests the decision of the Austrian authorities to terminate the advances on maintenance payments which he was receiving pursuant to Paragraph 4(3) of the UVG.
- 16 His father, Ingo Effing, is a German national. According to the information provided in the order for reference, there was proof of having his habitual residence in Austria, where he was an employed person. The Austrian Government has stated on this point, however, that until 30 June 2001, he was insured for social security purposes in Austria as an independent trader. Nils Laurin Effing is an Austrian national. He lives with his mother, who has custody, in Austria.
- 17 On 7 June 2000, the father of the claimant in the main proceedings was detained pending trial in Austria and was subsequently sentenced to a term of imprisonment. Nils Laurin Effing was then awarded a monthly advance on maintenance payments of EUR 200.43 pursuant to Paragraph 4(3) of the UVG, for the period from 1 June 2000 to 31 May 2003.

- 18 Nils Laurin Effing's father started to serve his custodial sentence at Garsten prison in Austria. On 19 December 2001 he was transferred to his country of origin, Germany, to serve the remainder of his sentence there. According to the order for reference, that transfer was effected pursuant to the Convention.
- 19 According to the information supplied by the German Government, pursuant to Article 9(1)(b) of the Convention, the sentence imposed in Austria on the father of the claimant in the main proceedings was converted to a prison sentence provided for by German legislation. The German Government has also stated that, during his imprisonment, in the period from February to July 2002, and also from September 2002 to March 2003, he performed paid work, in accordance with the obligation to work imposed on prisoners by German legislation. Contributions for unemployment insurance and health insurance were deducted from his pay. On 3 April 2003 he was released.
- 20 Following Nils Laurin Effing's father's transfer to Germany, the Bezirksgericht Donaustadt (Austria), the court of first instance, by decision handed down on 24 January 2002, terminated the advances on maintenance payments received by Nils Laurin Effing, as from the end of December 2001. According to that court, the conditions allowing for the grant of advances were no longer met on the ground that the father of the claimant in the main proceedings was in custody abroad.
- 21 Further to proceedings brought by Nils Laurin Effing, the Landesgericht für Zivilrechtssachen Wien (Austria), acting as a court of appeal, upheld the decision of the court of first instance. It held that the grant of advances on maintenance payments under Paragraph 4(3) of the UVG is subject to the condition that the person concerned must serve his sentence in Austria.

- 22 Nils Laurin Effing brought an action for judicial review of that decision before the Oberster Gerichtshof, arguing that the transfer of the debtor of the maintenance obligation to a prison in another Member State did not have the effect of terminating the payment of advances on maintenance payments. He submits that, according to Paragraph 4(3) of the UVG, a prison in Austria is to be equated with any other prison in the Community.
- 23 The Oberster Gerichtshof takes the view that Paragraph 4(3) of the UVG is to be interpreted as excluding from the benefit of advances on maintenance payments children who are dependents of foreign nationals serving, in their country of origin, prison sentences imposed on them in Austria. Relying on the preparatory documents relating to an amendment of an earlier version of the UVG in 1980, that court states, first, that minors whose parent is the debtor of the maintenance obligation and is incarcerated are innocent victims of offences committed by their parent and that they deserve compassion on the part of the State. Second, the resultant obligation of the Austrian State, that is, to ensure that sentenced persons receive an appropriate salary or are made able in some other way to meet their maintenance obligations, should be limited to prisoners who work and are in prison in Austria.
- 24 Finding, however, that such an interpretation of Paragraph 4(3) of the UVG might give rise to discrimination based on nationality and, consequently, infringement of Article 12 EC and Article 3 of Regulation No 1408/71, the Oberster Gerichtshof decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is Article 12 EC, in conjunction with Article 3 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, to be interpreted as precluding a national rule that discriminates against a Community

citizen in receipt of advances on maintenance payments, where the father liable for maintaining that citizen is serving a criminal sentence in his Member State of origin (i.e. not in Austria); and, where the child of a German national is resident in Austria, does denying that child entitlement to maintenance payments because his father is serving a criminal sentence, which was handed down in Austria, in his Member State of origin (and not in Austria) constitute discrimination against that child?

The question referred for a preliminary ruling

The applicability of Regulation No 1408/71

- 25 With regard, first, to the scope *ratione materiae* of Regulation No 1408/71, the Court has, as stated by the national court and the parties who have submitted observations to the Court, already had to rule, in connection with Regulation No 1408/71, on the classification of advances on maintenance payments provided for by the UVG (Case C-85/99 *Offermanns* [2001] ECR I-2261; and Case C-255/99 *Humer* [2002] ECR I-1205).
- 26 It follows from those judgments, *Offermanns* at paragraph 49 and *Humer* at paragraph 33, that such advances are family benefits within the meaning of Article 4 (1)(h) of Regulation No 1408/71.
- 27 Accordingly, in the present case it suffices to point out that the fact that the advances on maintenance payments were granted pursuant to Paragraph 4(3) of the UVG, namely on the ground that the father of the claimant, the person with the maintenance obligation, was serving a prison sentence, and not pursuant to the general provision in Paragraph 3 of the UVG, cannot affect the classification of the

advances in question as 'family benefits' within the meaning of Article 4(1)(h) of Regulation No 1408/71. According to Article 1(u)(i) of that regulation, the term 'family benefits' includes all benefits in cash or in kind intended to meet family expenses. In that connection, the Court has held that the expression 'to meet family expenses' in Article 1(u)(i) is to be interpreted as referring in particular to a public contribution to a family's budget to alleviate the financial burdens involved in the maintenance ('Unterhalt') of children (*Offermanns*, paragraph 41).

- 28 The granting of advances pursuant to Paragraph 4(3) of the UVG thus also comes within the scope *ratione materiae* of Regulation No 1408/71.
- 29 Second, as regards the scope *ratione personae* of Regulation No 1408/71, the Austrian Government maintains that a prisoner who has been transferred to another Member State to serve his sentence is not an employed person who has exercised his right to free movement of workers as guaranteed by the EC Treaty.
- 30 In that regard, Article 2(1) of Regulation No 1408/71 provides that the regulation applies to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and to the members of their families.
- 31 The terms 'employed person' and 'self-employed person' contained in that provision are defined in Article 1(a) of that regulation. They include any person insured under any of the social security schemes referred to in Article 1(a) against the contingencies and subject to the conditions referred to in that provision (Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 9; and Joined Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511, paragraph 27).

- 32 It follows, as the Court has stated in particular in paragraph 36 of Case C-85/96 *Martínez Sala* [1998] ECR I-2691, that a person has the status of employed person within the meaning of Regulation No 1408/71 where he is covered, if only in respect of a single risk, compulsorily or on an optional basis, by a general or special social security scheme mentioned in Article 1(a) of Regulation No 1408/71, irrespective of the existence of an employment relationship.
- 33 In those circumstances, contrary to the arguments of the Austrian Government, the German Government and the Commission rightly submit that the father of the claimant in the main proceedings is an employed person within the meaning of Article 2(1) of Regulation No 1408/71, since he was covered by unemployment insurance during most of the period in dispute, namely during his imprisonment in Germany. In addition, the cross-border element lies in the fact that the father of the claimant in the main proceedings is a German national who has worked in the Republic of Austria, the Member State in which, in the course of his imprisonment, he exercised his right to be transferred to his Member State of origin in order to serve his sentence there.

The legislation applicable and the absence of discrimination on grounds of nationality

- 34 With respect to the issue of determining the legislation applicable, the Austrian Government maintains that if the Court were to find that the principle in Regulation No 1408/71 was applicable to prisoners and that they had to be considered to be employed persons, it would be necessary to adopt, as the essential connecting factor, the Member State where that employed person was employed, in accordance with Article 13(2)(a) of that regulation. That means that in the present proceedings, even though Regulation No 1408/71 was, in principle, applicable to prisoners, the advances on maintenance payments provided for by Austrian law do not have to be granted after the transfer to another Member State of a prisoner who is liable for the maintenance payments.

- 35 The Austrian Government adds that if that connecting factor cannot be used on the ground, for example, that the new administering State makes no provision for employment of prisoners, it is necessary, pursuant to Article 13(2)(f) of Regulation No 1408/71, to rely on the legal rules pertaining to social security in the Member State of residence. In the present case, that would mean that, even though Regulation No 1408/71 was, in principle, applicable to prisoners, the advances on maintenance payments as provided for by Austrian law would no longer have to be granted after the transfer to another Member State of a prisoner who was liable for maintenance payments.
- 36 Moreover, Articles 73 and 74 of Regulation No 1408/71 show that the entitlement to family benefits for members of the family of that worker is not based on the legislation of the place of residence of the family member in question, but on the legislation of the competent Member State, namely, the one where the worker is employed.
- 37 The Commission states that, in the main proceedings, both Austrian law and German law should be applicable. It refers in this regard to Article 76 of Regulation No 1408/71, which introduces rules of priority in order to avoid overlapping entitlement to family benefits. That provision would be superfluous if, pursuant to the application of rules intended to avoid conflicts of laws, only the provisions of one legal order were always to apply.
- 38 In that connection the Court points out that the provisions of Title II of Regulation No 1408/71, of which Article 13 forms part, constitute a complete and uniform system of conflict rules. Those provisions are intended in particular to prevent the concurrent application of a number of national legislative systems and the complications which might ensue (Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 28).

- 39 The law applicable to the situation of an employed person in one of the situations covered by the provisions of Title II of Regulation No 1408/71 must therefore be determined in accordance with those provisions. Admittedly, as stated by the Advocate General in point 37 of her Opinion, the application of provisions from another system of legislation is not thereby always precluded. As observed by the Commission, such a situation may arise for example when two spouses work in two different Member States whose respective sets of legislation both provide for the payment of similar family benefits (see, in that regard, Case C-119/91 *McMenamin* [1992] ECR I-6393). In the present case, however, it is clear that nothing in the file submitted to the Court suggests that the claimant in the main proceedings may come within the scope of application of Regulation No 1408/71 in any capacity other than as a 'member of the family' of his father within the meaning of that regulation.
- 40 Article 13(2)(a) of Regulation No 1408/71 is intended to clarify which legislation is applicable in a situation where the employed person within the meaning of Regulation No 1408/71 is engaged in paid employment. In such a case, it is the legislation of the State where he is employed that is applicable.
- 41 By contrast, Article 13(2)(f) of Regulation No 1408/71 covers situations where the legislation of a Member State ceases to be applicable to the person concerned, on the ground, notably, that he has ceased carrying on his occupational activities without the legislation of another Member State becoming applicable to him in accordance with the rules laid down in Articles 13 to 17 of that regulation. In such a case the person in question is subject to the legislation of the Member State where he resides.
- 42 As regards the interpretation of Article 13(2)(a) of Regulation No 1408/71, it is true that, prior to the insertion of Article 13(2)(f) of that regulation, that provision was interpreted as meaning that an employed person who ceases carrying on his activities in the territory of one Member State and moves to another Member State without working there remains subject to the legislation of the Member State where he was last employed, regardless of how much time has elapsed since the end of the

activities in question and the end of the employment relationship (Case 302/84 *Ten Holder* [1986] ECR 1821, paragraph 15), unless the cessation was definitive (Case C-140/88 *Noij* [1991] ECR I-387, paragraphs 9 and 10; and Case C-215/90 *Twomey* [1992] ECR I-1823, paragraph 10).

- 43 However, Article 13(2)(f), which was introduced into Regulation No 1408/71 following the judgment in *Ten Holder*, implies that a cessation of all occupational activity, regardless of whether it is temporary or definitive, places the person in question outside the scope of application of Article 13(2)(a). Article 13(2)(f) thus applies *inter alia* to a person who has ceased carrying on occupational activity in one Member State and has transferred his residence to another Member State (see *Kuusijärvi*, paragraphs 39 to 42 and 50).
- 44 It follows from the foregoing that, in circumstances such as those in the main proceedings, in which a prisoner has ceased carrying on all occupational activity in the Member State where he started to serve his sentence and, at his request, was transferred from a prison in that Member State to a prison in his own Member State in order to serve the remaining 15 months of his sentence, the legislation applicable to him under the conflict rules contained in Article 13 of Regulation No 1408/71 cannot be that of the Member State from which he was transferred.
- 45 In those circumstances, the legislation applicable can only be that of the Member State in which the person in question is serving the remainder of his sentence. This finding alone suffices to resolve the issue in the main proceedings, and it is not necessary to determine whether the German legislation must apply in the present case pursuant to Article 13(2)(f) of Regulation No 1408/71 as legislation of the State of residence of the person in question, or, as the case may be, and taking account of the explanations in the observations of the German Government, pursuant to Article 13(2)(a) of that regulation as legislation of the Member State where the person in question carries on occupational activity.

- 46 The Court notes, moreover, that Articles 73 and 74 of that regulation provide that employed persons subject to the legislation of a Member State (or unemployed persons drawing unemployment benefits under the legislation of a Member State) are entitled, in respect of the members of their family who are residing in another Member State, to the family benefits provided for by the legislation of the former State (see, in particular, *Kuusijärvi*, paragraph 68).
- 47 It follows that Regulation No 1408/71 cannot be interpreted as precluding, in circumstances such as those at issue in the main proceedings, the legislation of a Member State from making the grant of family benefits to the members of a family of a person who has ceased carrying on all occupational activity within that State subject to the condition that that person maintains his residence there (see, by analogy, *Kuusijärvi*, paragraphs 50 and 51).
- 48 As regards in particular Article 3 of that regulation, it should be borne in mind that that provision prohibits all discrimination on grounds of nationality as regards the conditions under which the persons falling within the scope of the provisions of that regulation are entitled to the benefits of the legislation of any Member State 'subject to the special provisions of this regulation'. Moreover, as has been established above, it follows from Articles 13 and 73 of Regulation No 1408/71 that, in circumstances such as those present in the main proceedings here, where the father of the claimant in the main proceedings has ceased carrying on all occupational activity in Austria and no longer resides there, the granting of family benefits comes within the scope of the German legislation.
- 49 For similar reasons, in circumstances such as those in the main proceedings, Article 12 EC, to which the national court's question also refers in light of the German nationality of the father of the claimant in the main proceedings, does not preclude the application of legislation which, like the UVG, makes the granting of family benefits to the members of the family of a prisoner subject to the condition that the sentence be served within its territory.

- 50 The Court observes in this respect that Article 12(1) EC prohibits, within the scope of application of the Treaty, and without prejudice to the special provisions contained therein, any discrimination on grounds of nationality. That rule has been implemented, with respect to employed persons, by Articles 39 EC to 42 EC, and by acts of the Community institutions adopted on the basis of those articles and, in particular, by Regulation No 1408/71. Article 3 of that regulation is designed in particular to ensure for workers covered by the regulation, in accordance with Article 39 EC, equality in the area of social security without distinction as to nationality (Case 1/78 *Kenny* [1978] ECR 1489, paragraphs 9 and 11).
- 51 Moreover, although Article 12 EC and Article 3 of Regulation No 1408/71 are thus designed to eliminate discrimination on grounds of nationality which might result from the legislation or administrative practice of a Member State, they cannot have the effect of introducing disparities in treatment which may follow from differences in national legislation pertaining to family benefits designated as applicable under conflict of law rules such as those contained in Article 13(2) of Regulation No 1408/71.
- 52 It follows from all the foregoing that the answer to the question referred must be that, in circumstances such as those in the main proceedings, in which an employed person within the meaning of Article 2(1) of Regulation No 1408/71 has been transferred, as a prisoner, to the Member State from which he comes in order to serve the remainder of his sentence there, it is the legislation of that Member State which, in the area of family benefits and in accordance with the provisions of Article 13(2) of that regulation, is the applicable legislation. Neither the provisions of that regulation, particularly Article 3 thereof, nor Article 12 EC, preclude, in such a situation, the legislation of a Member State from making the grant of family benefits such as those provided for by the UVG to the members of the family of such a Community national subject to the condition that he remain a prisoner in that State.

Costs

- 53 Since these proceedings are, for the parties to the main proceedings, a step in the action 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 (First Chamber) rules as follows:

In circumstances such as those in the main proceedings, in which an employed person within the meaning of Article 2(1) of 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 by Regulation (EC) No 1386/2001 of the European Parliament and of the Council of 5 June 2001, has been transferred, as a prisoner, to the Member State from which he comes in order to serve the remainder of his sentence there, it is the legislation of that Member State which, in the area of family benefits and in accordance with the provisions of Article 13(2) of that regulation, is the applicable legislation. Neither the provisions of that regulation, particularly Article 3 thereof, nor Article 12 EC, preclude, in such a situation, the legislation of a Member State from making the grant of family benefits such as those provided for by the *Österreichisches Bundesgesetz über die Gewährung von Vorschüssen auf den Unterhalt von Kindern (Unterhaltsvorschußgesetz) (Austrian Federal Law on the Grant of Advances for the Maintenance of Children)* to the members of the family of such a Community national subject to the condition that he remain a prisoner in that State.

[Signatures]