

JUDGMENT OF THE COURT (Grand Chamber)

21 February 2006 *

In Case C-286/03,

REFERENCE for a preliminary ruling under Article 234 EC, by the Oberster Gerichtshof (Austria), made by decision of 27 May 2003, received at the Court on 3 July 2003, in the proceedings

Silvia Hosse

v

Land Salzburg,

THE COURT (Grand Chamber),

composed of V. Skouris, President, P. Jann, C.W.A. Timmermans, A. Rosas, K. Schieman and J. Makarczyk, Presidents of Chambers, J.-P. Puissechet (Rapporteur), R. Silva de Lapuerta, K. Lenaerts, P. Küris, E. Juhász, G. Arestis and A. Borg Barthet, Judges,

* Language of the case: German.

Advocate General: J. Kokott,
Registrar: K. Sztranc, Administrator,

having regard to the written procedure and further to the hearing on 31 May 2005,

after considering the observations submitted on behalf of:

- Silvia Hosse, by W. Riedl and P. Ringhofer, Rechtsanwälte,
- Land Salzburg, by F. Hitzenbichler and B. Zettl, Rechtsanwälte,
- the Austrian Government, by E. Riedl and M. Winkler, acting as Agents,
- the Netherlands Government, by H.G. Sevenster and N.A.J. Bel, acting as Agents,
- the Portuguese Government, by L. Fernandes and S. da Nóbrega Pizarro, acting as Agents,
- the Finnish Government, by T. Pynnä, acting as Agent,

- the United Kingdom Government, by C. Jackson, acting as Agent, and by E. Sharpston QC,

- the Commission of the European Communities, by V. Kreuschitz and D. Martin, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 20 October 2005,

gives the following

Judgment

- ¹ This reference for a preliminary ruling concerns the interpretation of Articles 4(2b) and 19 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EC) No 1399/1999 of 27 April 1999 (OJ 1999 L 164, p. 1) ('Regulation No 1408/71'), of Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475), as amended and updated by Council Regulation (EEC) No 2434/92 of 27 July 1992 (OJ 1992 L 245, p. 1), and of Articles 12 EC and 17 EC.

- 2 The reference was made in the course of proceedings between Silvia Hosse, of German nationality, and Land Salzburg (Province of Salzburg). Silvia Hosse, whose father is employed in Austria as a teacher in the Province of Salzburg, challenges the province's refusal to award her care allowance under the Salzburger Pflegegeldgesetz (Salzburg Law on Care Allowance, 'the SPGG').

Legal context

Community legislation

- 3 Article 1 of Regulation No 1408/71 provides:

'For the purpose of this Regulation:

(a) *employed person* and *self-employed person* mean respectively:

- (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 or by a special scheme for civil servants;

...

- (t) *benefits* and *pensions* mean all benefits and pensions, including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions;

...'

- 4 Article 2(1) of Regulation No 1408/71 defines the persons covered by the regulation:

'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 ... as well as to the members of their families and their survivors.'

- 5 Article 3(1) of Regulation No 1408/71, '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 of Regulation No 1408/71, 'Matters covered', provides:

'1. This Regulation shall apply to all legislation concerning the following branches of social security:

- (a) sickness and maternity benefits;
- (b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
- (c) old-age benefits;
- (d) survivors' benefits;
- (e) benefits in respect of accidents at work and occupational diseases;
- (f) death grants;
- (g) unemployment benefits;

(h) family benefits.

2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1.

2a. This Regulation shall also apply to special non-contributory benefits which are provided under legislation or schemes other than those referred to in paragraph 1 or excluded by virtue of paragraph 4, where such benefits are intended:

(a) either to provide supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1(a) to (h);

or

(b) solely as specific protection for the disabled.

2b. This Regulation shall not apply to the provisions in the legislation of a Member State concerning special non-contributory benefits, referred to in Annex II, Section III, the validity of which is confined to part of its territory.

...

7 Annex II, Section III, to Regulation No 1408/71 mentions in point K, for Austria:

‘Benefits granted under Bundesländer legislation for disabled persons and persons in the need of care.’

8 Article 19 of Regulation No 1408/71 states:

‘1. An employed or self-employed person residing in the territory of a Member State other than the competent State, who satisfies the conditions of the legislation of the competent State for entitlement to benefits, taking account where appropriate of the provisions of Article 18, shall receive in the State in which he is resident:

- (a) benefits in kind provided on behalf of the competent institution by the institution of the place of residence in accordance with the legislation administered by that institution as though he were insured with it;
- (b) cash benefits provided by the competent institution in accordance with the legislation which it administers. However, by agreement between the competent institution and the institution of the place of residence, such benefits may be provided by the latter institution on behalf of the former, in accordance with the legislation of the competent State.

2. The provisions of paragraph 1 shall apply by analogy to members of the family who reside in the territory of a Member State other than the competent State in so far as they are not entitled to such benefits under the legislation of the State in whose territory they reside.

Where the members of the family reside in the territory of a Member State under whose legislation the right to receive benefits in kind is not subject to condition of insurance or employment, benefits in kind which they receive shall be considered as being on behalf of the institution with which the employed or self-employed person is insured, unless the spouse or the person looking after the children pursues a professional or trade activity in the territory of the said Member State.'

9 Article 7 of Regulation No 1612/68 provides:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.

...'

National legislation

¹⁰ Paragraph 3(1) of the SPGG provides:

‘Persons reliant on care are entitled to care allowance if

1. they have Austrian nationality,
2. they have their main residence in the Province of Salzburg, and
3. they are not in receipt of any of the benefits listed in Paragraph 3 of the Bundespflegegeldgesetz (Federal Law on care allowance, BGBl. No 110/1993) and are not entitled to such a benefit.’

¹¹ Responsibility for the costs of granting care allowance under Paragraph 3(1) of the SPGG is governed by Paragraph 40 of the Sozialhilfegesetz (Law on social assistance), since that benefit is to be regarded as assistance in particular situations in life (Paragraph 17(2) of the SPGG).

12 Paragraph 40 of the Sozialhilfegesetz provides:

‘1. The costs of social assistance are to be borne by the province and the municipalities in accordance with the following provisions:

...

5. The municipalities of the political district in which those costs have been incurred are to pay the province annually the amount of 50% towards the costs ... of assistance in particular situations in life ...’

The main proceedings and the questions referred for a preliminary ruling

13 Mr Hosse, of German nationality, is a frontier worker employed in Austria as a teacher in the Province of Salzburg. He pays taxes and social security contributions in Austria and is affiliated to sickness insurance in that State. He resides in Germany, near the Austrian frontier, with his daughter Silvia Hosse, born in 1997, who is severely disabled.

14 Silvia Hosse’s mother was formerly in paid work in Germany which gave entitlement to German care allowance. Until her parental leave ended in September 2000, her daughter was able to receive that benefit, as her dependant. However, it ceased to be paid after the end of the parental leave, as the mother did not resume paid work.

- 15 An application was then made for care allowance under the SPGG for Silvia Hosse. The Province of Salzburg refused the application on the ground that under Paragraph 3(1)(2) of the SPGG the person reliant on care must have his main residence in that province in order to receive the allowance.
- 16 The action brought against that refusal was dismissed by the court of first instance. The court held that the allowance in question constituted, as regards Silvia Hosse, a special non-contributory benefit which was not covered by Regulation No 1408/71 and thus did not have to be exported.
- 17 The appellate court, on the other hand, referring to the Court's judgment in Case C-215/99 *Jauch* [2001] ECR I-1901, held that the allowance in question likewise constituted a sickness benefit within the meaning of Article 4(1)(a) of Regulation No 1408/71 and that that cash benefit had to be exported, like care allowance paid by Austria ('federal care allowance'), in accordance with the principles applicable to federal care allowance.
- 18 According to the appellate court, Silvia Hosse, as the daughter of a person compulsorily insured in Austria, was covered by Austrian sickness insurance and could therefore claim from the competent Austrian social insurance institution all the cash benefits provided for in the case of sickness. The court considered that in the present case the Province of Salzburg, which was competent for the payment of care allowance, was obliged to pay it as a cash sickness benefit. It took the view that the residence condition in Paragraph 3(1)(2) of the SPGG was ineffective as a result of the direct effect of Article 19(1) and (2) of Regulation No 1408/71.

- 19 The Oberster Gerichtshof (Supreme Court), hearing the appeal on a point of law against the appellate court's judgment, decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 4(2b) of [Regulation No 1408/71] in conjunction with Annex II, Section III, to be interpreted as meaning that care allowance under the [SPGG] awarded to a member of the family of a person employed in the Province of Salzburg who lives with his family in the Federal Republic of Germany is excluded from the scope of [Regulation No 1408/71] as a special non-contributory benefit?

(2) If the answer to Question 1 is in the negative:

May the member of the family of a person employed in the Province of Salzburg who lives with his family in the Federal Republic of Germany claim payment of care allowance under the [SPGG] as a sickness benefit in cash in accordance with Article 19 and the corresponding provisions of the other sections of Chapter 1 of Title III of Regulation No 1408/71, irrespective of the fact that his main residence is in the Federal Republic of Germany, if he satisfies the other conditions for receipt of the benefit?

(3) If the answer to Question 1 is in the affirmative:

Can a benefit such as care allowance under the [SPGG], as a social advantage within the meaning of Article 7(2) of [Regulation No 1612/68], be made subject to the condition that the recipient has his main residence in the Province of Salzburg?

(4) If the answer to Question 3 is in the affirmative:

Is the fact that citizens of the Union who work as frontier workers in the Province of Salzburg but have their main residence in another Member State are not entitled to claim a social advantage within the meaning of Article 7(2) of Regulation No 1612/68, such as care allowance under the [SPGG], compatible with Community law, in particular with the principles of citizenship of the Union and non-discrimination under Articles 12 EC and 17 EC?

If not: Does citizenship of the Union make it possible also for dependent family members of such a frontier worker who likewise have their main residence in another Member State to receive care allowance under the [SPGG] in the Province of Salzburg?’

The questions referred for a preliminary ruling

Question 1

²⁰ By its first question, the national court asks essentially whether a care allowance such as that granted under the SPGG constitutes a special non-contributory benefit which is excluded from the scope of Regulation No 1408/71 by Article 4(2b) of the regulation.

Preliminary observations

- ²¹ Article 4(2b) of Regulation No 1408/71 excludes from the scope of the regulation the provisions of the legislation of a Member State concerning the special non-contributory benefits referred to in Annex II, Section III, to the regulation whose validity is confined to part of its territory.
- ²² Point K of Annex II, Section III, to the regulation, relating to the Republic of Austria, mentions benefits granted under the provinces' legislation for disabled persons and persons in need of care. The care allowance provided for by the SPGG is thus indeed mentioned in Annex II, Section III, to Regulation No 1408/71.
- ²³ However, that mention is not sufficient to bring that benefit within the scope of Article 4(2b) of Regulation No 1408/71.
- ²⁴ As the Court has consistently held, the provisions of Regulation No 1408/71 adopted to give effect to Article 42 EC must be interpreted in the light of the objective of that article, which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. The aim of Articles 39 EC, 40 EC, 41 EC and 42 EC would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose the social security advantages

guaranteed them by the legislation of one Member State, especially where those advantages represent the counterpart of contributions which they have paid (see, for example, Case 284/84 *Spruyt* [1986] ECR 685, paragraphs 18 and 19).

25 In this context, the Community legislature is entitled to adopt provisions which derogate from the principle that social security benefits are exportable (see, inter alia, Case C-20/96 *Snares* [1997] ECR I-6057, paragraph 41). Such derogating provisions, and a fortiori Article 4(2b) of Regulation No 1408/71, which excludes certain specific benefits from the scope of that regulation, must be interpreted strictly. This means that that article can apply only to benefits which satisfy cumulatively the conditions it lays down, that is, benefits which are both special and non-contributory, are mentioned in Annex II, Section III, to the regulation, and are laid down by legislation whose application is limited to part of the territory of a Member State.

26 It must therefore also be ascertained whether, in addition to the condition that the legislation concerning the care allowance under the SPGG is mentioned in Annex II, Section III, to Regulation No 1408/71, the other conditions in Article 4(2b) of Regulation No 1408/71 are satisfied.

Observations submitted to the Court

27 The Province of Salzburg and the Austrian and United Kingdom Governments submit that the benefit at issue is a 'special' benefit within the meaning of Regulation No 1408/71.

- 28 The Province of Salzburg points out in particular that the benefit is not ancillary to a basic social security benefit and is not attached either to periods of professional activity or contribution or to membership of an insured class. It is therefore a 'special' benefit within the meaning of Regulation No 1408/71. The Province observes in this respect that historically the Federation has always been responsible for social security and the provinces for social assistance.
- 29 The Austrian Government puts forward substantially the same arguments and recalls in particular that the concept of 'special' benefit inserted into Regulation No 1408/71 corresponds to a category of 'mixed' benefits identified by the Court in a number of cases as having elements of social security and elements of social assistance at the same time.
- 30 The United Kingdom Government states that the presence of a link between a benefit and a social security scheme corresponding to the branches of social security listed in Article 4(1) of Regulation No 1408/71 does not in itself mean that that benefit cannot be classified as a 'special' benefit. If such classification were excluded, Article 4(2a)(a) of that regulation, which refers to special benefits intended to provide supplementary, substitute or ancillary cover against the risks covered by those branches, would be devoid of meaning, as would Article 10a(3) of the regulation.
- 31 The United Kingdom Government further submits essentially that the federal care allowance at issue in *Jauch* was not 'mixed' because it was granted exclusively in connection with a social security benefit, namely a pension, and never as social assistance. By contrast, another allowance, even covering an identical risk but

granted to some recipients solely as social assistance, would constitute a 'mixed' benefit. The recipient's state of need is an essential characteristic of social assistance, and that need is not necessarily pecuniary (see, inter alia, Case C-356/89 *Newton* [1991] ECR I-3017, and *Snares*).

- 32 The Portuguese and Finnish Governments adopt substantially the same positions.
- 33 The Netherlands Government proposes that the judgment in *Jauch* should be referred to.
- 34 The Commission, on the other hand, submits that the care allowance under the SPGG is not in the nature of a special benefit but of a social security benefit for sickness within the meaning of Article 4(1)(a) of Regulation No 1408/71.
- 35 It observes that Article 4(2b) of Regulation No 1408/71, as a derogation, must be interpreted strictly. It adds that the care allowance under the SPGG has the same object, amount and conditions of award as federal care allowance, is likewise granted objectively on the basis of a legally defined position, and therefore, like that allowance, constitutes a social security benefit for sickness within the meaning of Article 4(1)(a) of Regulation No 1408/71. The differences from federal care allowance in terms of the class of recipients and means of financing are consequently irrelevant.

The Court's answer

³⁶ The scheme of Regulation No 1408/71 shows that the concept of 'social security benefit' within the meaning of Article 4(1) and the concept of 'special non-contributory benefit' within the meaning of Article 4(2a) and (2b) of the regulation are mutually exclusive. A benefit which satisfies the conditions of a 'social security benefit' within the meaning of Article 4(1) of Regulation No 1408/71 therefore cannot be analysed as a 'special non-contributory benefit'.

³⁷ A benefit may be regarded as a social security benefit in so far as it is granted to the recipients, without any individual and discretionary assessment of personal needs, on the basis of a legally defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, *inter alia*, Case 249/83 *Hoeckx* [1985] ECR 973, paragraphs 12 to 14; Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 15; Case C-160/96 *Molenaar* [1998] ECR I-843, paragraph 20; and *Jauch*, paragraph 25).

³⁸ It follows that benefits which are granted objectively on the basis of a legally defined position and are intended to improve the state of health and life of persons reliant on care have the essential purpose of supplementing sickness insurance benefits, and must be regarded as 'sickness benefits' within the meaning of Article 4(1)(a) of Regulation No 1408/71 (*Molenaar*, paragraphs 24 and 25, and *Jauch*, paragraph 28).

- 39 A care allowance such as that granted under the SPGG is intended to compensate, in the form of a flat-rate contribution, for the additional expenditure resulting from the recipients' condition of reliance on care, in particular the cost of the assistance it is necessary to provide them with.
- 40 The amount of such a care allowance depends of the degree of reliance on care. It corresponds to the time spent on care, expressed in terms of hours per month. Assessment of reliance on care is regulated in detail in a measure laying down a classification according to degrees of reliance. The other income of the person reliant on care has no effect on the amount of the care allowance.
- 41 The allowance is paid to persons who do not receive any pension under the Federal provisions. Those persons are essentially members of the families of socially insured persons, recipients of social assistance, disabled workers, and persons receiving pensions from the provinces and municipalities.
- 42 Consequently, while a care allowance such as that at issue in the main proceedings may have a different system from that applicable to the German benefits of insurance against reliance on care at issue in *Molenaar* and the Austrian federal care allowance at issue in *Jauch*, it none the less remains of the same kind as those benefits.
- 43 Moreover, as the Court observed in *Jauch*, the conditions for the grant of care allowance and the way in which it is financed cannot have the intention or the effect of changing the character of care allowance as analysed in the *Molenaar* and *Jauch*

judgments. The fact that the grant of the benefit is not necessarily linked to payment of a sickness insurance benefit or a pension awarded on a basis other than sickness insurance cannot therefore change that analysis.

- 44 In those circumstances, even if they have their own particular characteristics, such benefits must be regarded as sickness benefits within the meaning of Article 4(1)(a) of Regulation No 1408/71.
- 45 In the light of the above factors, one of the conditions necessary for Article 4(2b) of Regulation No 1408/71 to apply, namely the classification of the benefit in question as a 'special benefit', is not satisfied. There is thus no longer any need to consider whether the other conditions laid down in that article are satisfied.
- 46 Consequently, the answer to Question 1 must be that a care allowance such as that provided for by the SPGG does not constitute a special non-contributory benefit within the meaning of Article 4(2b) of Regulation No 1408/71 but a sickness benefit within the meaning of Article 4(1)(a) of that regulation.

Question 2

- 47 By its second question, the national court asks whether a member of the family of a worker employed in the Province of Salzburg who lives with his family in Germany

may, where he fulfils the other conditions of grant, claim payment of a care allowance such as that paid under the SPGG as a sickness benefit in cash as provided for in Article 19 and the equivalent provisions of the other sections of Chapter 1 of Title III of Regulation No 1408/71.

48 A sickness benefit such as the care allowance under the SPGG which takes the form of financial aid which enables the standard of living of persons reliant on care to be improved as a whole, so as to compensate for the additional expense brought about by their condition, is a 'cash benefit' of sickness insurance referred to in Article 19(1)(b) of Regulation No 1408/71 (see *Molenaar*, paragraphs 35 and 36).

49 It is not disputed, moreover, that Mr Hosse is a worker falling within the scope of Regulation No 1408/71.

50 It is also apparent from the documents before the Court that the entitlement to the care allowance under the SPGG is an entitlement of Silvia Hosse's own, not one derived from her father.

51 However, that does not prevent Silvia Hosse from being able to benefit from the care allowance of the Province of Salzburg even though she resides in Germany, if she

satisfies the other conditions of grant laid down in Article 19 and the equivalent provisions of the other sections of Chapter 1 of Title III of Regulation No 1408/71.

52 It is true that the Court has held that, by virtue of Article 2 of Regulation No 1408/71, members of the family of a worker have only derived rights, that is, rights acquired in that capacity, not rights of their own which they enjoy without any relation of kinship with the worker (see, in particular, Case 40/76 *Kermaschek* [1976] ECR 1669, paragraph 7).

53 However, the Court subsequently limited that rule of case-law to cases in which a member of the worker's family relies on provisions of Regulation No 1408/71 which apply solely to workers and not to members of their families, such as Articles 67 to 71 of that regulation relating to unemployment benefits (see Case C-308/93 *Cabanis-Issarte* [1996] ECR I-2097). That is not the case with Article 19 of the regulation, the purpose of which is precisely to guarantee the worker and the members of the family residing in a Member State other than the competent State the grant of the sickness benefits provided for by the applicable legislation, in so far as the members of the family are not entitled to those benefits under the legislation of the State in whose territory they reside.

54 Moreover, the intention of Article 19(2) of Regulation No 1408/71 is in particular that the grant of sickness benefits should not be conditional on the residence of the members of the worker's family in the competent Member State, so as not to deter Community workers from exercising their right to freedom of movement.

- 55 It would accordingly be contrary to Article 19(2) of Regulation No 1408/71 to deprive the daughter of a worker of a benefit she would be entitled to if she were resident in the competent State.
- 56 The answer to Question 2 must therefore be that a member of the family of a worker employed in the Province of Salzburg who lives with his family in Germany may, where he fulfils the other conditions of grant, claim from the competent institution of the worker's place of employment payment of a care allowance such as that paid under the SPGG, as a sickness benefit in cash as provided for in Article 19 of Regulation No 1408/71, in so far as the member of the family is not entitled to a similar benefit under the legislation of the State in whose territory he resides.
- 57 In view of the answer to Questions 1 and 2, there is no need to answer the other questions.

Costs

- 58 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 (Grand Chamber) hereby rules:

- 1. A care allowance such as that provided for by the Salzburger Pflegegeldgesetz does not constitute a special non-contributory benefit within the meaning of Article 4(2b) 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 but a sickness benefit within the meaning of Article 4(1)(a) of that regulation.**
- 2. A member of the family of a worker employed in the Province of Salzburg who lives with his family in Germany may, where he fulfils the other conditions of grant, claim from the competent institution of the worker's place of employment payment of a care allowance such as that paid under the Salzburger Pflegegeldgesetz, as a sickness benefit in cash as provided for in Article 19 of Regulation No 1408/71, in so far as the member of the family is not entitled to a similar benefit under the legislation of the State in whose territory he resides.**

[Signatures]