



## Reports of Cases

### JUDGMENT OF THE COURT (Fifth Chamber)

24 October 2013\*

(Request for a preliminary ruling — Social security — Regulation (EEC) No 1408/71 — Family benefit — Child bonus — National regulation providing for a benefit to be granted by way of an automatic tax rebate for children — Non-cumulation of family benefits)

In Case C-177/12,

REQUEST for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Luxembourg), made by decision of 29 March 2012, received at the Court on 17 April 2012, in the proceedings

**Caisse nationale des prestations familiales**

v

**Salim Lachheb,**

**Nadia Lachheb,**

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, E. Juhász, A. Rosas (Rapporteur), D. Šváby and C. Vajda, Judges,

Advocate General: M. Wathelet,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- the Caisse nationale des prestations familiales, by A. Rodesch, avocat,
- Mr and Mrs Lachheb, by C. Rimondini, avocat,
- the European Commission, by V. Kreuzschitz and G. Rozet, acting as Agents,

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

gives the following

\* Language of the case: French.

## Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Articles 18 TFEU and 45 TFEU, Articles 1(u)(i), 3 and 4(1)(h) 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, 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 647/2005 of the European Parliament and of the Council of 13 April 2005 (OJ 2005 L 117, p. 1) ('Regulation No 1408/71'), and Article 7 of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ, English Special Edition 1968 (II), p. 475).
- 2 The request has been made in proceedings between, on the one hand, the Caisse nationale des prestations familiales (National Family Benefits Fund; 'the CNPF') and, on the other hand, Mr and Mrs Lachheb, resident in France, one of whom works in Luxembourg and the other in France, concerning a decision of the CNPF to include a benefit known as a 'child bonus' in the calculation undertaken to determine the amount of family benefits to which Mr and Mrs Lachheb would be entitled from the Luxembourg State.

### Legal context

#### *European Union law*

- 3 The first, fifth, eighth and tenth recitals in the preamble to Regulation No 1408/71 are worded as follows:

'... the provisions for coordination of national social security legislations fall within the framework of freedom of movement for workers who are nationals of Member States and should contribute towards the improvement of their standard of living and conditions of employment;

...

... it is necessary, within the framework of that coordination, to guarantee within the Community equality of treatment under the various national legislations to workers living in the Member States and their dependants and their survivors;

...

... employed persons and self-employed persons moving within the Community should be subject to the social security scheme of only one single Member State in order to avoid overlapping of national legislations applicable and the complications which could result therefrom;

...

... with a view to guaranteeing the equality of treatment of all workers occupied on the territory of a Member State as effectively as possible, it is appropriate to determine as the legislation applicable, as a general rule, that of the Member State in which the person concerned pursues employment of self-employment'.
- 4 Article 1 of Regulation No 1408/71 sets out the applicable definitions for the purposes of that regulation.

5 Article 1(u) of Regulation No 1408/71 thus provides:

- ‘(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’.

6 Article 3(1) of Regulation No 1408/71 provides:

‘Subject to the special provisions of this Regulation, persons 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.’

7 According to Article 4(1)(h) of Regulation No 1408/71, that regulation applies to all legislation relating to the branches of social security concerning family benefits.

8 By virtue of Article 4(2) thereof, Regulation No 1408/71 applies to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or ship owner in respect of the benefits referred to in paragraph 1.

9 Article 5 of Regulation No 1408/71 is worded as follows:

‘The Member States shall specify the legislation and schemes referred to in Article 4(1) and (2), the special non-contributory benefits referred to in Article 4(2a), the minimum benefits referred to in Article 50 and the benefits referred to in Articles 77 and 78 in declarations to be notified and published in accordance with Article 97.’

10 Article 13 of that regulation, which is entitled ‘General rules’, provides:

‘1. Subject to Articles 14c and 14f, persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this Title.

2. 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;

...’

11 Article 73 of Regulation No 1408/71 provides:

‘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.’

12 Article 76 of Regulation No 1408/71 is worded as follows:

‘1. Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Articles 73 or 74, shall be suspended up to the amount provided for in the legislation of the first Member State.

2. If an application for benefits is not made in the Member States in whose territory the members of the family are residing, the competent institution of the other Member State may apply the provisions of paragraph 1 as if benefits were granted in the first Member State.’

13 Article 7(1) and (2) 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.’

14 Article 10(1) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation No 1408/71 (OJ, English Special Edition 1972 (I), p. 160), as amended and updated by Regulation No 118/97 (‘Regulation No 574/72’), provides:

‘(a) Entitlement to benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance, employment or self-employment, shall be suspended when, during the same period and for the same member of the family, benefits are due only in pursuance of the national legislation of another Member State or in application of Articles 73, 74, 77 or 78 of [Regulation No 1408/71], up to the sum of those benefits.

(b) However, where a professional or trade activity is carried out in the territory of the first Member State:

(i) in the case of benefits due either only under national legislation of another Member State or under Articles 73 or 74 of the Regulation to the person entitled to family benefits or to the person to whom they are to be paid, the right to family benefits due either only under national legislation of that other Member State or under these Articles shall be suspended up to the sum of family benefits provided for by the legislation of the Member State in whose territory the member of the family is residing. The cost of the benefits paid by the Member State in whose territory the member of the family is residing shall be borne by that Member State;

...’

15 It should be noted, first, that Regulation No 1408/71 has been replaced by 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, second, that Regulation No 574/72 has been replaced by Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation No 883/2004 (OJ 2009 L 284, p. 1), those regulations having become applicable on 1 May 2010, in accordance with

Article 91 of Regulation No 883/2004 and Article 97 of Regulation No 987/2009. However, given the material time of the facts at issue in the main proceedings, those facts continue to be governed by Regulation No 1408/71 and by Regulation No 574/72.

*Luxembourg law*

- <sup>16</sup> The Law of 21 December 2007 on the introduction of the Law on the child bonus, (*Mémorial A 2007*, p. 3949) amended, with effect from 2008, the system for the tax rebate for children provided for under Luxembourg legislation. Article 5 of that Law, which features under Title II thereof, provides as follows:

‘The Law of 21 December 2007 on the child bonus is hereby enacted.

The articles of the abovementioned Law are as follows:

“Article 1.

For every child living, either in the joint household of his father and mother, or in the household of the father or mother who has sole responsibility for his education and maintenance, and for whom an entitlement to family allowances accrues, in accordance with Article 1 of the Law of 19 June 1985 on family allowances and creating the Caisse nationale des prestations familiales [(*Mémorial A 1985*, p. 680)], as amended, a child bonus shall be granted by way of automatic rebate in the tax reduction provided under Article 122 of the Law of 4 December 1967 on income tax, as amended.

Article 2.

The child bonus shall be fixed at [EUR] 922.50 per annum. It shall be paid during the tax year to which it relates, as provided for in detailed rules to be set out in the Grand-Ducal regulation referred to in Article 6.

Together with the payment of family benefits, the [CNPF] shall discharge its legal obligations by making payment to the person assigned to receive family allowances as provided for in Article 5(1) and (4), or, in the case of the child for whom one of the parents has sole responsibility for his education and maintenance, to the parent so assigned, as provided in the first sentence of Article 5(2) of the Law of 19 June 1985 on family allowances and creating the Caisse nationale des prestations familiales, as amended.

...

Article 4.

Articles 23(2) and (3), 24, 26, 27, 28, 29, 30 and 31 of the Law of 19 June 1985 on family allowances and creating the Caisse nationale des prestations familiales, as amended, and Articles 208(4), 273(5), 276, 278(1) and (2), 291, 292a, 302(4), 311, 333 and 334(1) of the Social Insurance Code shall also be applicable for the implementation of this Law, with the appropriate adaptations of terminology where required.

Article 5.

The words “of the child bonus” are added to the first sentence of the first paragraph of Article 6 of the Law of 19 June 1985 on family allowances and creating the Caisse nationale des prestations familiales, as amended, and are inserted after “from the start of the school year”.

Article 6.

A Grand-Ducal regulation may set out the detailed rules for the application of this Law.”

...’

- 17 Article 29 of the Law of 19 June 1985 on family allowances and creating the Caisse nationale des prestations familiales, to which Article 4 of the Law of 21 December 2007 on the child bonus refers for the purposes of its implementation, became, following the entry into force of the Law of 13 May 2008 creating a single statute (*Mémorial* A 2008, p. 790), Article 317 of the Social Insurance Code. That Article 29 provides:

‘In any event, only one payment of the same kind per child shall be due.

A Grand-Ducal regulation shall make provision for the prevention or restriction of the cumulation, up to the amount of the higher allowance, of the benefits provided in this instrument with those provided for the same purpose by a non-Luxembourg scheme.’

- 18 Article 1 of the Grand-Ducal Regulation of 19 December 2008 laying down rules for the payment of the child bonus as from 2009 (*Mémorial* A 2008, p. 3305 ; ‘the Grand-Ducal Regulation of 19 December 2008’), which implements Article 6 of the Law of 21 December 2007 on the child bonus, provides:

‘From 1 January 2009, the child bonus shall be paid in monthly instalments of [EUR] 76.88 per child for each month during which the beneficiary child referred to in Article 1 of the Law of 21 December 2007 on the child bonus confers entitlement to full family allowances. ...

By way of exception to paragraph 1, the bonus shall be included in the differential supplement up to the amount of [EUR] 76.88 per child, for each month during which the beneficiary child confers entitlement to differential family benefits granted under compulsory affiliation to the Luxembourg social security system. The differential supplement shall be paid annually or every six months upon presentation of a certificate of payment of non-Luxembourg benefits received during the reference period.

The bonus shall be paid in accordance with the same rules as those governing family allowances.’

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

- 19 Mr and Mrs Lachheb reside with their children in Mondelange (France). According to the documents before the Court, first, Mr Lachheb is employed in Luxembourg, while his wife works in France, and, second, Mr and Mrs Lachheb are entitled, under Luxembourg legislation, to the payment of a ‘differential supplement’ by the CNPF, the amount of which corresponds to the difference between the family benefits to which they are entitled from the State in which Mr Lachheb is employed, namely the Grand Duchy of Luxembourg, and those benefits which they can claim from the State in which they reside, namely the French Republic.
- 20 Following an objection lodged by Mr and Mrs Lachheb, the Steering Committee of the CNPF upheld a decision of the president of the CNPF, which, from April 2009, had taken into account the child bonus, owed to Mr and Mrs Lachheb under Luxembourg legislation, in the calculation of the differential supplement provided for in the second paragraph of Article 1 of the Grand-Ducal Regulation of 19 December 2008.

- 21 On appeal by Mr and Mrs Lachheb, the Conseil arbitral de la sécurité sociale (Social Security Arbitration Board) overturned that decision, in its ruling of 7 February 2011, by refusing, on the basis of Article 95 of the Constitution, to apply the Grand-Ducal Regulation of 19 December 2008 due to its lack of compliance with the Law of 21 December 2007 on the child bonus, as that Law guarantees that the tax reductions for children in respect of whom entitlement to family allowances accrues are paid in the form of child bonuses by way of an automatic rebate. The Conseil arbitral de la sécurité sociale declared that Mr and Mrs Lachheb were entitled to continue to receive, as from April 2009, the child bonus provided for by way of automatic rebate in the tax reduction.
- 22 The CNPF brought an appeal on a point of law against that judgment before the Cour de Cassation (Court of Cassation), the referring court, putting forward five pleas in law, the first three of which allege infringement of, refusal to apply, incorrect application of, or misinterpretation of Articles 1(u)(i), 3(1), 4(1)(h) and 76(i) of Regulation No 1408/71 and of Article 10 of Regulation No 574/72.
- 23 The referring court observes that the child bonus provided for by Luxembourg legislation is deemed by that legislation to be a family benefit which is subject to the non-cumulation rules laid down in that regard.
- 24 According to the referring court, the mechanism of the differential supplement, taken from European Union law and to which the Grand-Ducal Regulation of 19 December 2008 refers, is relevant if it is applied to a benefit defined as a family benefit within the terms of Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71. By contrast, if the mechanism of the differential supplement is applied to advantages which do not constitute social security benefits within the meaning of that regulation, that application – which would have the effect of depriving a proportion of the frontier workers who travel from other Member States to Luxembourg in order there to carry out a professional activity from the full payment of the child bonus, which, however, is granted in full to workers residing in Luxembourg – could constitute a discriminatory measure within the meaning of Article 7 of Regulation No 1612/68, Articles 18 TFEU and 45 TFEU and Article 3 of Regulation No 1408/71.
- 25 As it was uncertain whether a benefit such as the child bonus provided for under the Luxembourg legislation can be classified as a family benefit within the meaning of Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71, the Cour de cassation decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:
1. Does a benefit such as that set out in the Law of 21 December 2007 on the child bonus constitute a family benefit within the meaning of Article 1(u)(i) and Article 4(1)(h) of [Regulation No 1408/71]?
  2. If the reply to the first question is in the negative, do Articles 18 [TFEU] and 45 [TFEU], Article 7 of [Regulation No 1612/68] or Article 3 of [Regulation No 1408/71] preclude a national regulation such as that at issue in the main proceedings, under which the granting of a benefit such as that set out in the Law of 21 December 2007 on the child bonus to workers who carry out their professional activity in the territory of the Member State concerned and who reside with members of their family in the territory of another Member State is suspended up to the amount of the family benefits provided for the members of their family by the legislation of the Member State of residence, the national regulation requiring the application, to the benefit concerned, of the rules concerning non-cumulation of family benefits set out in Article 76 of [Regulation No 1408/71] and Article 10 of [Regulation No 574/72]?

## The questions referred for a preliminary ruling

### *The first question*

- 26 By its first question, the referring court seeks to establish whether Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71 must be interpreted as meaning that a benefit such as the child bonus provided for by the Law of 21 December 2007 on the child bonus is a family benefit within the meaning of that regulation.
- 27 It should be borne in mind, at the outset, that, in accordance with the wording of Article 4(1) of Regulation No 1408/71, which refers expressly to 'legislation concerning the ... branches of social security', the material scope of that directive extends to all legislation of the Member States relating to the branches of social security listed in points (a) to (h) of that provision.
- 28 Specifically, the Court has repeatedly held that the distinction between benefits excluded from the scope of Regulation No 1408/71 and those which fall within its scope is based essentially on the constituent elements of each particular benefit, in particular its purposes and the conditions on which it is granted, and not on whether a benefit is classified as a social security benefit by national legislation (see Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 14). Further, the Court has made it clear that characteristics which are purely formal must not be considered relevant criteria for the classification of benefits (See Case C-228/07 *Petersen* [2008] ECR I-6989, paragraph 21 and the case-law cited). Consequently, the fact that a benefit is governed by national tax law is not conclusive for the purpose of evaluating its constituent elements.
- 29 In order to carry out that evaluation, it is necessary, in the first place, to examine whether the child bonus, such as that at issue in the main proceedings, must be considered to be a 'social security benefit' within the meaning of Regulation No 1408/71.
- 30 According to settled case-law, 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 C-503/09 *Stewart* [2011] ECR I-6497, paragraph 32 and the case-law cited).
- 31 As the CNPF and the Commission contend, the benefit at issue in the main proceedings is, first, automatically granted in the case where there is a dependent child in order to compensate for the maintenance of that child, and, second, it corresponds to a set amount, granted automatically, without any link to the income or the tax owed by the applicant. Consequently, a benefit such as that at issue in the main proceedings is indeed a social security benefit.
- 32 Moreover, the Court has already held that the method by which a benefit is financed is immaterial for the purposes of its classification as a social security benefit, as is clear from the fact that under Article 4(2) of Regulation No 1408/71 non-contributory benefits are not excluded from the scope of that regulation (see *Hughes*, paragraph 21). Similarly, the Court has made it clear that the legal mechanism by which the Member State implements the benefit has no bearing on the question of whether that measure is to be classified as a social security benefit (see, to that effect, Case C-85/99 *Offermanns* [2001] ECR I-2261, paragraph 46).
- 33 In the second place, it is necessary to determine the precise nature of the measure at issue in the main proceedings. In order to distinguish between different categories of social security benefit, the risk covered by each benefit must be taken into consideration (Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 27).

- 34 Specifically, Article 1(u)(i) of Regulation No 1408/71 provides that ‘the term *family benefits* means all benefits in kind or in cash intended to meet family expenses’. In this regard, the Court has held that family benefits are intended to provide social assistance for workers with dependent families in the form of a contribution by society towards their expenses (see Case 104/84 *Kromhout* [1985] ECR 2205, paragraph 14, and Joined Cases C-216/12 and C-217/12 *Hliddal and Bornand* [2013] ECR, paragraph 54 and the case-law cited).
- 35 The expression ‘to meet family expenses’ in Article 1(u)(i) of Regulation No 1408/71 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 of children (*Offermanns*, paragraph 41, and Case C-333/00 *Maaheimo* [2002] ECR I-10087, paragraph 25).
- 36 In the case in the main proceedings, it must be observed that, as the CNPF and the Commission point out, and as is apparent from the documents before the Court, the child bonus, which is paid for each dependent child, represents a public contribution to a family’s budget to alleviate the financial burdens involved in the maintenance of children and therefore constitutes a family benefit within the meaning of Article 1(u)(i) of Regulation No 1408/71.
- 37 In that regard, the fact that the public contribution to a family’s budget takes the form of a cash benefit payable under the national tax law regime and that the child bonus has its origin in a tax reduction for children has no bearing on the classification of that benefit as a ‘family benefit’ under the principles set out in paragraph 32 of the present judgment.
- 38 It follows from all of the foregoing that a benefit such as the child bonus at issue in the main proceedings is a family benefit within the meaning of Article 1(u)(i) of Regulation No 1408/71.
- 39 The answer to the first question is therefore that Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71 must be interpreted as meaning that a benefit such as the child bonus introduced by the Law of 21 December 2007 on the child bonus is a family benefit within the meaning of that regulation.

#### *The second question*

- 40 In view of the answer to the first question, there is no need to answer the second question.

#### **Costs**

- 41 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 (Fifth Chamber) hereby rules:

**Articles 1(u)(i) and 4(1)(h) 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, in the version amended and updated by Council Regulation (EC) No 118/97 of 2 December 1996, as amended by Regulation (EC) No 647/2005 of the European Parliament and of the Council of 13 April 2005, must be interpreted as meaning that a benefit such as the child bonus introduced by the Law of 21 December 2007 on the child bonus is a family benefit within the meaning of that regulation.**

[Signatures]