

JUDGMENT OF THE COURT (Fifth Chamber)
5 October 1995 *

In Case C-321/93,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Sozialgericht Nürnberg (Germany) for a preliminary ruling in the proceedings pending before that court between

José Imbernon Martínez

and

Bundesanstalt für Arbeit,

on the interpretation of Article 73 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 by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1),

THE COURT (Fifth Chamber),

composed of: C. Gulmann, President of the Chamber, J. C. Moitinho de Almeida (Rapporteur), D. A. O. Edward, J.-P. Puissochet and L. Sevón, Judges,

* Language of the case: German.

Advocate General: M. B. Elmer,
Registrar: H. von Holstein, Deputy Registrar,

after considering the written observations submitted on behalf of:

- Jesús Prieto Peláez, Head of Social Services at the Spanish Consulate General, Labour Welfare Office, Munich, for the plaintiff in the main action,
- by Alberto José Navarro González, Director-General for Community Legal and Institutional Coordination, and Gloria Calvo Díaz, Abogado del Estado, of the Community Contentious Affairs Department, acting as Agents, for the Spanish Government,
- by Dimitrios Gouloussis, Legal Adviser, and Horstpeter Kreppel, a German civil servant seconded to the Commission's Legal Service under the national civil servant exchange scheme, acting as Agents, for the Commission of the European Communities,

having regard to the Report for the Hearing,

after hearing the oral observations submitted by the plaintiff in the main action, by the German Government, represented by Bernd Klope, Oberregierungsrat at the Federal Ministry of the Economy, acting as Agent, by the Spanish Government and by the Commission, represented by Dimitrios Gouloussis and Jörn Sack, Legal Adviser, at the hearing on 30 March 1995,

after hearing the Opinion of the Advocate General at the sitting on 8 June 1995,

gives the following

Judgment

- 1 By order of 26 April 1993 received at the Court on 21 June 1993, amended by order of 2 July 1993 received at the Court on 29 July 1993, the Sozialgericht Nürnberg (Social Court, Nuremberg) referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty three questions on the interpretation of Article 73 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 by Council Regulation (EEC) No 3427/89 of 30 October 1989 (OJ 1989 L 331, p. 1).
- 2 The questions were raised in proceedings concerning the refusal of the Bundesanstalt für Arbeit, Kindergeldkasse (Federal Employment Office, Family Allowance Section) to grant Mr Imbernon Martínez for the period between September and December 1988, in addition to the family allowance for dependent children, the supplementary allowance (Zuschlag zum Kindergeld) at the full rate.
- 3 The supplementary allowance is provided for by Paragraph 11a of the German Law on family allowances (the Bundeskindergeldgesetz, BGBl. 1990 I, p. 149, hereinafter 'the BKGG'), by way of assistance for low-income beneficiaries. The first and sixth paragraphs of that provision are as follows:

'1. The family allowance for children in respect of whom the beneficiary is entitled to the dependent child allowance under Paragraph 32(6) of the Income

Tax Law shall be increased by the supplement assessed under subparagraph 6 if the taxable income (Paragraph 2(5) of the Income Tax Law) of the beneficiary is less than the basic tax free allowance under Paragraph 32a(1)(1) of the Income Tax Law. The taxable income shall be taken into account in so far as and in the manner in which it was made the basis of taxation; where relevant the taxable income shall be determined as a negative amount. If the scale of income tax has been calculated according to Paragraph 32a(5) or (6) of the Income Tax Law the basic tax free allowance shall be replaced by double that amount. The first sentence does not apply to persons whose income, together with that of their spouse unless legally separated or divorced, is comprised essentially of foreign income or national income received abroad or paid by an international institution and as such is not subject to taxation under the Income Tax Law.

6. The supplement shall be one-twelfth of 19% of the difference between the taxable income and the basic tax free allowance calculated in accordance with the first or third sentence of paragraph (1), subject to a maximum of 19% of the sum total of the tax free allowance for dependent children to which the beneficiary is entitled. Where the tax is calculated pursuant to Paragraph 32b of the Income Tax Law, the percentage calculated in accordance with the first sentence shall be replaced by a percentage equal to the difference between the percentage calculated in accordance with the first sentence and the particular amount indicated in the tax return. Paragraph 20(3) applies.'

- 4 The first sentence of Paragraph 1(1) of the Einkommensteuergesetz (the German law on income tax, hereinafter 'the EStG') provides that 'natural persons who have their permanent residence or usual abode in Germany are fully liable to income tax'.

- 5 Paragraph 26(1) of the EStG provides that 'married persons who are neither legally separated nor divorced and who are fully liable to income tax may, if they satisfy those requirements on the commencement of the taxable period or did so during the course of that period, choose to be taxed separately (Paragraph 26a) or jointly (Paragraph 26b)'.
- 6 Paragraph 26b of the EStG provides (under the so-called 'splitting' scheme) that 'where the spouses' income is taxed as a whole, their incomes are aggregated and attributed to them jointly; save as otherwise provided the spouses are to be regarded as jointly taxable'.
- 7 Paragraph 32 of the EStG provides that 'children may be taken into account only if they were fully assessable to income tax at the commencement of the calendar year or became so during it' (Paragraph 2). Paragraph 32(6) provides that 'a tax allowance for a dependent child of DM 1 242 shall be deducted from the income for each of the tax payer's children to be taken into account. For married couples jointly assessed under Paragraphs 26 and 26b the said allowance to be deducted shall be DM 2 484 if the child is the child of both spouses...'
- 8 The order for reference states that from 1 January to 18 September 1988 Mr Imbernón Martínez was in Spain, where he was unemployed; thereafter he transferred his residence to Germany where he was in paid employment from 21 September 1988. During that year his two children and his wife, who had neither employment nor income, lived in Spain.

- 9 The decision of the Finanzamt (Tax Office) Ansbach adjusting the sums deducted at source by way of wage tax and church tax for 1988 provided for a tax allowance for dependent children calculated pro rata on the basis of the number of months spent by Mr Imbernon Martínez in Germany during the relevant year. The allowance was granted on the basis of Paragraph 33a(1) of the EStG, which allows the taxpayer, exceptionally and in specified cases, to claim maintenance expenditure for persons under the age of 18 and in respect of whom neither the taxpayer nor any other person is entitled to a tax allowance for dependent children within the meaning of Paragraph 32(6) of the EStG. No tax allowance was accorded in respect of his wife, however, in the absence of a 'certificate of lack of means'.
- 10 Since his wife did not live in Germany, Mr Imbernon Martínez's tax was not calculated on the basis of Paragraph 32a(5) of the EStG (under the 'splitting' regime, Paragraph 26b of the EStG), and the double tax allowance provided for in Paragraph 32a(1), second sentence, point (1), of the EStG was also not granted.
- 11 With effect from September 1988 Mr Imbernon Martínez was granted the German family allowance at the full rate for his two children. As regards the supplementary allowance, which is at issue in these proceedings, the Ansbach Family Allowance Fund rejected Mr Imbernon Martínez's application for it to be calculated with reference to the tax allowances for dependent children for which he had been unable to qualify under the tax rules.
- 12 An objection to that decision was likewise rejected by a decision of 23 August 1990, which is the subject-matter of the main action.

- 13 The court of reference considers that the plaintiff's entitlement to receive the supplementary allowance at the full rate depends on whether the rule of notional residence in Article 73 of the regulation applies in the context of Paragraph 11a of the BKGG and the tax provisions referred to therein.
- 14 It points out that to qualify for the allowance at issue there must be, in particular, entitlement to a tax allowance for a dependent child within the meaning of Paragraph 32(6) of the EStG, which may be claimed only in respect of children who 'may be taken into account' within the meaning of Paragraph 32(2) of the EStG, that is to say, children who are fully assessable to income tax in Germany. That requirement can only be satisfied, however, if the children permanently reside or have their usual abode in Germany (Paragraph 1(1), first sentence of the EStG). Consequently, the plaintiff in the main action is not entitled to such an allowance under Paragraph 32 unless Article 73 requires him to be treated as if his children were residing in Germany not only as regards social security but also for tax purposes.
- 15 The national court adds that only if the rule of notional residence applies likewise to the spouse can the defendant in the main action be obliged to base its decision on the supplementary allowance on twice the amount of the basic allowance in accordance with Paragraph 11a(1), third sentence, of the BKGG. Finally, for Mr Imbernon Martínez to be able to claim the full rate of the allowance at issue the defendant in the main action would have to treat him as if the amount of income tax resulting from application of the standard rate had been calculated in accordance with Paragraph 32a(5) of the EStG (splitting).
- 16 The Sozialgericht Nürnberg decided to stay the proceedings pending a ruling from the Court of Justice on the following questions:

- '1. Does the rule of notional residence contained in Article 73 of Council Regulation (EEC) No 1408/71 mean that persons entitled to a family allowance whose children reside in another Member State must be treated for the purposes of Paragraph 11a of the Bundeskindergeldgesetz (Law on family allowances) and the tax provisions referred to therein as if their children were resident within the territory covered by that Law?

2. (a) Does the rule of notional residence contained in Article 73 of Council Regulation (EEC) No 1408/71 mean that persons entitled to a family allowance whose spouses reside in another Member State must be treated for the purposes of Paragraph 11a of the Bundeskindergeldgesetz and the tax provisions referred to therein as if their spouses were resident within the territory covered by that Law?

- (b) If Question 2(a) is answered in the affirmative, must the plaintiff be treated as if the rate of income tax had been calculated in accordance with Paragraph 32a(5) of the Einkommensteuergesetz (Income Tax Law)?'

- 17 Before examining those questions it should be stated that as a result of amendments to the EStG by the Gesetz zur Bekämpfung des Missbrauchs und zur Bereinigung des Steuerrechts (Tax Law Reform and Antifraud Law, BGBl. I, p. 2310) of 21 December 1993, which was applied retroactively in favour of the plaintiff in the main action, Mr Imbernon Martínez has in the meantime been granted the supplementary allowance at the full rate for the period in question. However, he has

successfully argued before the national court that he still has an interest in having his rights in that respect confirmed (*Fortsetzungsfeststellungsinteresse*), so that proceedings are still pending before that court, which in order to give judgment must take into account the preliminary ruling; consequently, it is necessary to answer the questions which have been referred.

First question

- 18 The first question seeks essentially to know whether Article 73 of Regulation No 1408/71 is to be interpreted as meaning that where under the tax legislation of a Member State to which that State's social legislation refers entitlement to and the amount of benefits for dependent children is linked to their residence in the national territory that condition must be regarded as fulfilled if the children reside in the territory of another Member State.
- 19 It is common ground that an allowance such as the supplementary allowance for children provided for in Paragraph 11 of the BKG is a family benefit for the purposes of Regulation No 1408/71 falling within Chapter 7 ('Family Benefits') of Title III of the regulation, to which Article 73 belongs.
- 20 That article provides that 'an unemployed 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'.

- 21 It must be remembered that the purpose of that provision is to prevent Member States from making entitlement to and the amount of family benefits dependent on residence of the members of the worker's family in the Member State providing the benefits, so that Community workers may not be deterred from exercising their right to freedom of movement (see paragraph 12 of the judgment in Case C-228/88 *Bronzino* [1990] ECR I-531).
- 22 It follows that where, as in the main action in this case, entitlement to and the amount of benefits for dependent children are subject to their being resident in the national territory, that condition must be regarded as fulfilled, for the purposes of determining entitlement to and the amount of the benefits in question, where the children reside in the territory of another Member State.
- 23 The fact that, as in this case, the residence requirement is imposed by tax legislation to which the social legislation refers in order to determine those entitled and the amount of the family benefit does not affect that conclusion: the rule of notional residence laid down in Article 73 of Regulation No 1408/71 would be largely deprived of its effect if it could be defeated merely by referring to tax legislation.
- 24 The reply to the first question is therefore that Article 73 of Regulation No 1408/71 is to be interpreted as meaning that where under the tax legislation of a Member State to which that State's social legislation refers entitlement to and the amount of benefits for dependent children is linked to their residence in the national territory that condition must be regarded as fulfilled if they reside in the territory of another Member State.

Second and third questions

- 25 In the second and third questions, which should be examined together, the national court seeks in essence to ascertain whether Article 73 of Regulation No 1408/71 is to be interpreted as meaning that where under the tax legislation of a Member State to which that State's social legislation refers entitlement to and the amount of benefits for dependent children is linked to residence in the national territory of the worker's spouse that condition must be regarded as fulfilled if the spouse resides in the territory of another Member State, and whether, if so, that tax legislation applies, for the purposes of determining entitlement to and calculation of the benefit, on the basis that the spouse resides notionally in the Member State providing the benefits.
- 26 The national court states that the wording of Article 73 of Regulation No 1408/71 appears to preclude the rule of notional residence it lays down from being extended to a worker's spouse where the benefit is granted in respect of another member of the family.
- 27 It is sufficient to note that there is no support for interpreting the provision thus restrictively; for the reason given in Paragraph 21 the provision must be broadly interpreted so as to apply to all members of the worker's family, where entitlement to and the amount of a family benefit depends, directly or indirectly, on residence by one of the members of the worker's family in the Member State providing the benefit.

- 28 Consequently, in order to determine in a case such as this whether the worker is entitled to the allowance at issue and to calculate the amount thereof, it is necessary to apply all the tax provisions of the Member State providing the benefits to which that State's social legislation refers for the purposes of determining those entitled to and the amount of the allowance at issue on the basis that the worker's spouse resides notionally in that State.
- 29 In that regard it should be noted that, as the Court stated in *Schumacker* (Case C-279/93 [1995] ECR I-225, paragraph 45), Council Directive 77/799/EEC of 19 December 1977 concerning mutual assistance by the competent authorities of the Member States in the field of direct taxation (OJ 1977 L 336, p. 15) provides for ways of overcoming administrative difficulties in taking into account the personal and family circumstances of non-residents.
- 30 The reply to the second and third questions is therefore that Article 73 of Regulation No 1408/71 is to be interpreted as meaning that where under the tax legislation of a Member State to which that State's social legislation refers entitlement to and the amount of benefits for dependent children is linked to residence in the national territory of the worker's spouse that condition must be regarded as fulfilled if the spouse resides in the territory of another Member State. For the purposes of entitlement to and calculation of the benefit in question all the relevant tax legislation must be applied as if the spouse resided in the Member State providing the benefits.

Costs

- 31 The costs incurred by the German and Spanish Governments and by the Commission of the European Communities, 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 questions referred to it by the Sozialgericht Nürnberg by order of 26 April 1993, amended by order of 2 July 1993, hereby rules:

1. Article 73 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 by Council Regulation (EEC) No 3427/89 of 30 October 1989, is to be interpreted as meaning that where under the tax legislation of a Member State to which that State's social legislation refers entitlement to and the amount of benefits for dependent children is linked to their residence in the national territory that condition must be regarded as fulfilled if they reside in the territory of another Member State.
2. Article 73 of Regulation No 1408/71 is to be interpreted as meaning that where under the tax legislation of a Member State to which that State's social legislation refers entitlement to and the amount of benefits for dependent children is linked to residence in the national territory of the worker's spouse that condition must be regarded as fulfilled where the spouse resides in the territory of another Member State. For the purposes of determining

entitlement to and the amount of the benefit all the relevant tax legislation must be applied as if the spouse resided in the Member State providing the benefits.

Gulmann

Moitinho de Almeida

Edward

Puissochet

Sevón

Delivered in open court in Luxembourg on 5 October 1995.

R. Grass

Registrar

C. Gulmann

President of the Fifth Chamber