

JUDGMENT OF THE COURT (Fifth Chamber)

5 May 2011 *

In Case C-206/10,

ACTION for failure to fulfil obligations under Article 258 TFEU, brought on 29 April 2010,

European Commission, represented by V. Kreuschitz, acting as Agent, with an address for service in Luxembourg,

applicant,

v

Federal Republic of Germany, represented by T. Henze and C. Blaschke, acting as Agents, with an address for service in Luxembourg,

defendant,

* Language of the case: German.

supported by:

Kingdom of the Netherlands, represented by M. Noort, acting as Agent,

intervener,

THE COURT (Fifth Chamber),

composed of J.-J. Kasel, President of the Chamber, A. Borg Barthet (Rapporteur) and M. Berger, Judges,

Advocate General: V. Trstenjak,
Registrar: A. Calot Escobar,

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

gives the following

Judgment

- ¹ By its application, the European Commission requests the Court to declare that, by making the grant of benefits for the blind, the deaf and the disabled under Länder legislation ('the contested legislation') conditional, in respect of persons for whom

the Federal Republic of Germany is the competent Member State, upon the recipient being resident or habitually resident in the German Land concerned, the Federal Republic of Germany has failed to fulfil its obligations under Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community (OJ 1968 L 257, p. 2), and under Article 4(1)(a) 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 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'), in conjunction with Title III, Chapter 1 of that regulation.

Legal context

European Union legislation

- ² Under Article 7 of Regulation No 1612/68:

'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.

...'

3 Article 4 of Regulation No 1408/71, entitled 'Matters covered,' provides:

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

(a) sickness and maternity benefits;

...

2a. ...

"Special non-contributory cash benefits" means those:

(a) which are intended to provide either:

(i) supplementary, substitute or ancillary cover against the risks covered by the branches of social security referred to in paragraph 1, and which guarantee the persons concerned a minimum subsistence income having regard to the economic and social situation in the Member State concerned;

or (ii) solely specific protection for the disabled, closely linked to the said person's social environment in the Member State concerned ...

...

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.

...'

⁴ Annex II, Part III, of Regulation No 1408/71, entitled 'Special non-contributory benefits within the meaning of Article 4(2b) which do not fall within the scope of the Regulation', states, for Germany:

'(a) Benefits granted under Länder legislation for the disabled, and in particular for the blind.'

National legislation

- 5 The contested legislation grants benefits for the blind, the deaf and the disabled which are intended to compensate for the extra expenses connected with their disability. Those benefits are granted only to persons who have their residence or habitual residence in the Land concerned.
- 6 That legislation provides that the benefits under the State social security system which pursue the same end as the benefits granted by the Länder are to be deducted from the latter. The rate of set-off depends on the legislation of the Land concerned.
- 7 Where the disabled person moves into a home or an institution, the entitlement to benefits is maintained in certain Länder, provided that the home is located in Federal territory and that, at the time of the move, the person concerned was resident in the Land in question.

The pre-litigation procedure

- 8 By letter of 14 March 2002, the Commission drew the attention of the Federal Republic of Germany to the need to enable workers who are in employment in Germany while residing in another Member State, and members of their families, to export the benefits granted under the contested legislation. According to the Commission, the imposition of a residence requirement is contrary to Article 39 EC and to Article 7(2) of Regulation No 1612/68.

- 9 By letter of 22 April 2002, the Federal Republic of Germany replied that those benefits constituted social advantages within the meaning of Article 7 of Regulation No 1612/68, but that they should not be exported since they are granted independently of the status of worker and are conditional only on the place of residence.
- 10 By letter of formal notice of 9 July 2004, the Commission informed the Federal Republic of Germany of its doubts as to the compatibility of the disputed legislation with Regulations No 1612/68 and No 1408/71. With regard in particular to Regulation No 1408/71, the Commission stated that the benefits in question did not constitute special non-contributory benefits within the meaning of Article 4(2c) of that regulation, but sickness benefits within the meaning of Article 4(1)(a) of that regulation, so that cross-border workers could not be refused the possibility of exporting those benefits.
- 11 By letter of 14 September 2004, the Federal Republic of Germany replied that it did not agree with the Commission's analysis. With regard to Regulation No 1408/71, it stated that the benefits in question were justified by the extra costs connected with blindness or disability, whether or not the recipient was dependent on another person.
- 12 On 21 March 2005, the Commission sent the Federal Republic of Germany a reasoned opinion alleging only an infringement of Article 7 of Regulation No 1612/68, while reserving the right to recommence the procedure as regards the compatibility of the contested legislation with Regulation No 1408/71 following the judgment which the Court was to deliver in Case C-286/03 *Hosse* [2006] ECR I-1771.
- 13 By letter of 25 May 2005, the Federal Republic of Germany confirmed its position.

- ¹⁴ Proceedings were then stayed pending the judgments which the Court was to deliver in that case and in Case C-299/05 *Commission v Parliament and Council* [2007] ECR I-8695. In those judgments, the Court ruled that the benefits at issue in those cases were sickness benefits.
- ¹⁵ On 3 June 2008, the Permanent Representatives Committee of the Council of the European Union ‘Employment, Social Policy, Health and Consumer Affairs’ reached an agreement on the content of Annexes X and XI to 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), which repealed Regulation No 1408/71 with effect from its date of application, 1 May 2010. Under that agreement, the German benefits provided for in the contested legislation do not appear in those annexes.
- ¹⁶ On 1 December 2008, the Commission sent the Federal Republic of Germany a supplementary reasoned opinion alleging that the contested legislation was incompatible with Regulation No 1408/71 since the case-law resulting from the judgments in *Hosse* and *Commission v Parliament and Council* called into question the special nature of the benefits in question.
- ¹⁷ In its reply of 1 April 2009, the Federal Republic of Germany referred to the entry into force during 2010 of Regulation No 883/2004. Since that Regulation was also applicable to the benefits in question, Germany requested that proceedings be stayed.
- ¹⁸ On 29 April 2010, the Commission brought the present action.

- 19 By order of the President of the Court of 27 September 2010, the Kingdom of the Netherlands was granted leave to intervene in support of the form of order sought by the Federal Republic of Germany.
- 20 By letter of 19 October 2010, the Kingdom of the Netherlands waived its right to lodge a statement in intervention.

The action

The infringement of Regulation No 1408/71

Arguments of the parties

- 21 The Commission submits that, although the benefits in question are listed in Annex II, Part III, of Regulation No 1408/71, they are not special non-contributory benefits within the meaning of Article 4(2c) of that regulation, but sickness benefits within the meaning of Article 4(1)(a) of that regulation and therefore exportable.
- 22 In the Commission's submission, the special nature of the benefits in question has not been established since, in accordance with the Court's case-law, a special benefit must either replace or supplement a social security benefit, while being distinguishable from it, and be by its nature social assistance justified on economic and social

grounds and fixed by legislation setting objective criteria (*Commission v Parliament and Council*, paragraph 55). The benefits in question are granted on the basis of a statutorily defined position without any individual assessment of personal needs, are intended to improve the state of health and living conditions of disabled persons and thus have as their essential purpose supplementing sickness insurance benefits.

²³ In addition, the Commission points out that, when Regulation No 883/2004 was adopted, the German delegation did not seek the inclusion of the Länder benefits for the blind, the deaf and the disabled in Annexes X and XI to that regulation. In its submission, accordingly, it would be contradictory for the Federal Republic of Germany to assert that those benefits must be classified as ‘special non-contributory benefits’ within the meaning of Article 4(2b) of Regulation No 1408/71.

²⁴ The Federal Republic of Germany, while contending that the Commission itself was doubtful as to the classification of the benefits in question until delivery of the judgments in *Hosse* and *Commission v Parliament and Council*, states that the Länder took steps to bring the contested legislation into line with European Union law. The judicial amendments necessary would probably be made in 2010 or at the latest in 2011.

Findings of the Court

²⁵ It must be borne in mind that, according to settled case-law, the question whether a Member State has failed to fulfil its obligations must be determined by reference to the situation obtaining in the Member State at the end of the period laid down in the reasoned opinion and the Court cannot take account of any subsequent changes (see,

in particular, Case C-9/07 *Commission v France* [2007] ECR I-121, paragraph 8, and Case C-48/10 *Commission v Spain*, paragraph 30).

- ²⁶ The Federal Republic of Germany does not dispute that, at the end of the period laid down in the supplementary reasoned opinion, the contested legislation did not comply with Regulation No 1408/71.
- ²⁷ The Court has repeatedly held that a benefit is regarded as a social security benefit where it is granted, without any individual and discretionary assessment of personal needs, to recipients on the basis of a statutorily defined position and relates to one of the risks expressly listed in Article 4(1) of Regulation No 1408/71 (see, *inter alia*, *Hosse*, paragraph 37, and *Commission v Parliament and Council*, paragraph 56).
- ²⁸ It follows that benefits granted objectively on the basis of a statutorily defined position and intended to improve the state of health and quality of life of persons reliant on care have as their essential purpose supplementing sickness insurance benefits and must therefore be regarded as ‘sickness benefits’ for the purpose of Article 4(1)(a) of Regulation No 1408/71 (*Hosse*, paragraph 38, and *Commission v Parliament and Council*, paragraph 61).
- ²⁹ Such is the position in the present case as regards the benefits paid by the Länder to the blind, the deaf and the disabled since they are intended to compensate, in the form of a flat-rate contribution, for the additional everyday expenditure resulting from the recipients’ disability.

- 30 Since those benefits are sickness benefits within the meaning of Article 4(1)(a) of Regulation No 1408/71, they must in consequence be granted irrespective of the Member State in which the recipient is resident, in accordance with the provisions of Title III, Chapter 1, of that regulation.
- 31 In those circumstances, the Commission's complaint alleging infringement of Regulation No 1408/71 must be considered well founded.

The infringement of Regulation No 1612/68

Arguments of the parties

- 32 The Commission submits that the grant of the benefits in question on the basis of the sole criterion of residence in the Land concerned is not justified. In the Commission's submission, any advantage awarded by a Member State to its citizens because of their objective status as workers or by virtue of the mere fact of their residence on the national territory falls within the scope of Article 7 of Regulation No 1612/68, with the result that cross-border workers must also benefit from those advantages on the same basis as any other worker resident in the Member State of employment.
- 33 The Federal Republic of Germany merely points out that Regulations No 1612/68 and No 1408/71 have different fields of application and thus apply independently of each other.

Findings of the Court

- ³⁴ It is common ground that the benefits granted by the Länder for the blind, the deaf and the disabled constitute a social advantage within the meaning of Article 7(2) of Regulation No 1612/68.
- ³⁵ The Federal Republic of Germany does not dispute, in that regard, that the grant of those benefits is conditional on the recipient having his residence or habitual residence in the Land concerned.
- ³⁶ According to the Court's settled case-law, the equal treatment rule which appears in Article 7 of Regulation No 1612/68 prohibits not only overt discrimination on grounds of nationality but also all covert forms of discrimination which, by the application of other criteria of differentiation, lead in fact to the same result (see, *inter alia*, Case C-57/96 *Meints* [1997] ECR I-6689, paragraph 44, and Case C-269/07 *Commission v Germany* [2009] ECR I-7811, paragraph 53).
- ³⁷ Unless it is objectively justified and proportionate to the aim pursued, a provision of national law must be regarded as indirectly discriminatory if it is intrinsically liable to affect migrant workers more than national workers and if there is a consequent risk that it will place the former at a particular disadvantage (*Meints*, paragraph 44, and *Commission v Germany*, paragraph 54).
- ³⁸ That is the case of the residence condition laid down in the contested legislation for the grant of benefits for the blind, the deaf and the disabled, which can be more easily satisfied by German workers than by those from Member States other than the Federal Republic of Germany.

- 39 With regard to the argument put forward by the Federal Republic of Germany concerning the different fields of application of Regulations No 1612/68 and No 1408/71, it is sufficient to note that, although those two regulations do not have the same scope *ratione personae*, the fact remains that, since Regulation No 1612/68 is of general application as regards the free movement of workers, Article 7(2) thereof may apply to social advantages which, at the same time, fall specifically within the scope of Regulation No 1408/71 (Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817, paragraphs 20 and 21, and Case C-85/96 *Martínez Sala* [1998] ECR I-2691, paragraph 27).
- 40 In those circumstances, the Commission's complaint alleging infringement of Regulation No 1612/68 must be considered well founded.
- 41 It follows from all the foregoing considerations that, by making the grant of benefits for the blind, the deaf and the disabled under the contested legislation conditional, in respect of persons for whom the Federal Republic of Germany is the competent Member State, upon a condition of residence or habitual residence in the Land concerned, the Federal Republic of Germany has failed to fulfil its obligations under Article 4(1)(a) of Regulation No 1408/71, in conjunction with Title III, Chapter 1 of that regulation, and under Article 7(2) of Regulation No 1612/68.

Costs

- 42 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs and the Federal Republic of Germany has been unsuccessful, the Federal Republic of Germany must be ordered to pay the costs. In

accordance with the first subparagraph of Article 69(4) thereof, the Kingdom of the Netherlands, which has intervened in this dispute, must bear its own costs.

On those grounds, the Court (Fifth Chamber) hereby:

- 1. Declares that, by making the grant of benefits for the blind, the deaf and the disabled under Länder legislation conditional, in respect of persons for whom the Federal Republic of Germany is the competent Member State, upon a condition of residence or habitual residence in the Land concerned, the Federal Republic of Germany has failed to fulfil its obligations under Article 4(1)(a) 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 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, in conjunction with Title III, Chapter 1 of that regulation, and under Article 7(2) of Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community;**
- 2. Orders the Federal Republic of Germany to pay the costs;**
- 3. Orders the Kingdom of the Netherlands to bear its own costs.**

[Signatures]