Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

19 July 2012*

(Social security for migrant workers — Regulation (EC) No 987/2009 — Article 44(2) — Examination of entitlement to old-age pension — Taking into account of child-raising periods completed in another Member State — Applicability — Article 21 TFEU — Free movement of citizens)

In Case C-522/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Sozialgericht Würzburg (Germany), made by decision of 29 October 2010, received at the Court on 9 November 2010, in the proceedings

Doris Reichel-Albert

v

Deutsche Rentenversicherung Nordbayern,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, G. Arestis and D. Šváby (Rapporteur), Judges,

Advocate General: N. Jääskinen,

Registrar: A. Impellizzeri, Administrator,

having regard to the written procedure and further to the hearing on 12 January 2012,

after considering the observations submitted on behalf of:

— Mrs Reichel-Albert, by J. Schwach, Rechtsanwalt,

— the Deutsche Rentenversicherung Nordbayern, by W. Willeke, Direktor,

— the German Government, by T. Henze and J. Möller, acting as Agents,

— the Austrian Government, by C. Pesendorfer, acting as Agent,

— the European Commission, by V. Kreuschitz and M. van Hoof, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 1 March 2012,

* Language of the case: German.

gives the following

Judgment

1 This reference for a preliminary ruling concerns the interpretation of Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems (OJ 2009 L 284, p. 1).

2 The reference was made in the context of proceedings between Mrs Reichel-Albert and the Deutsche Rentenversicherung Nordbayern ('the DRN') concerning the refusal by the latter to take into account and credit, for the purposes of calculating Mrs Reichel-Albert's future old-age pension, 'child-raising periods' and 'periods to be taken into consideration' completed by her in Belgium.

Legal context

European Union legislation

Regulation (EEC) No 1408/71

3 Article 13(2) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416) lays down a series of rules governing the applicable legislation in that area. It is stated that those rules apply subject to the provisions of Articles 14 to 17 of that regulation, which contain a number of specific rules.

4 Article 13(2)(a) of that regulation provides:

'…

a worker 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.'

5 Article 13(2)(f) of Regulation No 1408/71, introduced by Council Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulation No 1408/71 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation No 1408/71 (OJ 1991 L 206, p. 2), with effect as from 29 July 1991, provides:

'a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.'

Regulation (EC) No 883/2004

6 Regulation (EC) No 883/2004 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 entered into force on 20 May 2004, has as its purpose the coordination of national social security systems. Under Article 91 thereof, it is applicable as from the date of entry into force of its implementing regulation, Regulation No 987/2009, namely 1 May 2010, and replaces, updates and simplifies the earlier arrangement.

7 Article 87 of that regulation, laying down 'Transitional provisions', provides:

'1. No rights shall be acquired under this Regulation for the period before its date of application.

2. Any period of insurance and, where appropriate, any period of employment, self-employment or residence completed under the legislation of a Member State prior to the date of application of this Regulation in the Member State concerned shall be taken into consideration for the determination of rights acquired under this Regulation.

3. Subject to paragraph 1, a right shall be acquired under this Regulation even if it relates to a contingency arising before its date of application in the Member State concerned.

…'

Regulation No 987/2009

8 Regulation No 987/2009 lays down the procedure for implementing basic Regulation No 883/2004, pursuant to Article 89 of the latter.

9 Article 44 of Regulation No 987/2009, entitled '[t]aking into account of child raising-periods', provides:

'1. For the purposes of this Article, "child-raising period" refers to any period which is credited under the pension legislation of a Member State or which provides a supplement to a pension explicitly for the reason that a person has raised a child, irrespective of the method used to calculate those periods and whether they accrue during the time of child-raising or are acknowledged retroactively.

2. Where, under the legislation of the Member State which is competent under Title II of the basic Regulation, no child-raising period is taken into account, the institution of the Member State whose legislation, according to Title II of the basic Regulation, was applicable to the person concerned on the grounds that he or she was pursuing an activity as an employed or self-employed person at the date when, under that legislation, the child-raising period started to be taken into account for the child concerned, shall remain responsible for taking into account that period as a child-raising period under its own legislation, as if such child-raising took place in its own territory.

…'

10 Article 93 of that regulation, entitled '[t]ransitional provisions', is worded as follows:

'Article 87 of the basic Regulation shall apply to the situations covered by the implementing Regulation.'

The German legislation

11 The German legislation provides for two mechanisms for taking child-raising periods into account under the statutory old-age pension scheme. Under the first, child-raising periods ('Kindererziehungszeiten') are taken into account as periods of compulsory contribution to the statutory old-age insurance scheme, thereby allowing those periods to count towards the calculation of the qualifying period required in order to receive an old-age pension. Under the second, periods to be taken into consideration ('Berücksichtigungszeiten') do not give rise to any pension rights, but are used in the calculation of certain qualifying periods, preserve the protection afforded to persons with reduced earning capacity and have a positive impact on the value attributed to periods without contributions.

12 Paragraph 56 of Book VI of the German Social Security Code (Sozialgesetzbuch) ('SGB VI'), entitled 'Child-raising periods', provides:

'(1) A child-raising period shall be the period spent raising a child during the first three years of its life. A period spent raising a child shall be credited to one of the parents of the child (Paragraph 56(1), first sentence, point 3, and Paragraph 56(3), points 2 and 3, of the SGB I) if:

1. the period spent raising the child is to be attributed to that parent;

2. the child-raising took place in the Federal Republic of Germany or can be treated as having taken place there; and

3. that parent is not barred from being credited with that period.

…

(3) Raising shall be deemed to have taken place in the Federal Republic of Germany where the child-raising parent has habitually resided there with the child. A period of child-raising shall be treated as child-raising in the Federal Republic of Germany where the child-raising parent has habitually resided abroad with his or her child and during the period devoted to child-raising or immediately before the birth of the child has completed periods of compulsory contribution by virtue of an activity carried on there as an employed or self-employed person. Where spouses or partners are resident abroad together, the same shall also apply where the spouse or partner of the child-raising parent paid such compulsory contributions or did not do so only because he or she was one of the persons referred to in Paragraph 5(1) and (4) or was exempt from compulsory insurance.

…'

13 Paragraph 57 of the SGB VI, entitled 'Periods to be taken into consideration', reads as follows:

'The period devoted to raising a child until the end of the child's 10th year shall constitute a period to be taken into consideration for one of the parents if the conditions for attribution of a period of child-raising are also fulfilled during that period. …'

14 For children born before 1 January 1992, Paragraph 249 of the SGB VI reduces the contribution period for child-raising from three years to 12 months.

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

15 Mrs Reichel-Albert, a German national, pursued an activity as an employed person in Germany and lived there until 30 June 1980. She then received unemployment benefit paid by that Member State until 10 October 1980.

16 From 1 July 1980 to 30 June 1986, she was resident in Belgium with her spouse, who pursued an activity as an employed person there. The couple have two children, who were born in Belgium on 25 May 1981 and 29 October 1984 respectively.

17 From 1 January 1984, she made voluntary contributions to the statutory old-age insurance scheme in Germany.

18 On 1 July 1986, Mrs Reichel-Albert, her spouse and their children were officially declared to be resident in Germany.

19 By decisions of 12 August and 28 October 2008, the DRN rejected Mrs Reichel-Albert's request to have the child-raising periods and 'periods to be taken into consideration' completed during her stay in Belgium taken into account and credited, on the ground that, during that period, the child-raising took place abroad. Only periods after 1 July 1986, the date on which the family was officially resident again in Germany, were credited as periods to be taken into consideration for child-raising purposes. On 1 December 2008, Mrs Reichel-Albert lodged a complaint, which the DRN rejected by decision of 29 January 2009.

20 The decisions of the DRN state that, during her stay in Belgium, the required link with working life in Germany was maintained neither through Mrs Reichel-Albert's own employment nor through her spouse, as more than one full month elapsed between the end of Mrs Reichel-Albert's activity as an employed person, including her period of unemployment, and the beginning of the child-raising period.

21 By application of 13 February 2009, Mrs Reichel-Albert brought an action before the Sozialgericht Würzburg seeking to have the decision on her complaint given on 29 January 2009 annulled and the DRN ordered to take into account the period from 25 May 1981 to 30 June 1986 in respect of her first child and the period from 29 October 1984 to 30 June 1986 in respect of her second. In support of her action, she made reference to the judgments in Case C-135/99 *Elsen* [2000] ECR I-10409 and Case C-28/00 *Kauer* [2002] ECR I-1343 and asserted that she had not, at that time, completely left Germany for Belgium.

22 The Sozialgericht Würzburg considered that a combined reading of Paragraph 56(3) of the SGB VI and Article 44(2) of Regulation No 987/2009 would not permit Mrs Reichel-Albert to have the child-raising periods in dispute credited, either in Germany or in Belgium, in so far as she was not pursuing any activity — as an employed person or otherwise — on the date when those periods had commenced, and that she would thus be penalised for exercising her right under Article 21 TFEU to move and reside freely within the European Union.

23 In that context, the Sozialgericht Würzburg decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

'1. Is Article 44(2) of Regulation [No 987/2009] to be interpreted as precluding an arrangement in one Member State whereby child-raising periods completed in another Member State of the European Union are to be recognised as such periods completed in the former Member State only if the child-raising parent was habitually resident abroad with the child and paid compulsory contributions during the raising or immediately before the birth of the child because of employment or self-employment there or, where spouses or partners were resident abroad

together, if the spouse or partner of the child-raising parent paid such compulsory contributions or did not do so solely because he or she was a person as referred to in Paragraph 5(1) and (4) of the SGB VI [Book VI of the Sozialgesetzbuch] or was exempted from compulsory insurance pursuant to Paragraph 6 of the SGB VI (Paragraphs 56(3), second and third sentences; 57; 249 SGB VI)?

2. Is Article 44(2) of Regulation [No 987/2009] to be interpreted, despite its wording, as meaning that, in exceptional cases, child-raising periods must be taken into account even where there has been no employment or self-employment if such a period would not otherwise be taken into account under the appropriate legislation either in the competent Member State or in another Member State in which the person was habitually resident while raising the children?'

The questions referred for a preliminary ruling

Preliminary observations on the applicability ratione temporis of Article 44 of Regulation No 987/2009

24 Given the chronology of the facts at issue in the main proceedings, as described in paragraphs 15 to 21 of this judgment, and the date of entry into force of Regulation No 987/2009, the first issue to be resolved is whether Article 44 of that regulation, of which the referring court has requested an interpretation, is in fact applicable ratione temporis to the facts at issue in the main proceedings.

25 It is settled case-law in that regard that, in general, the principle of legal certainty precludes a European Union measure from taking effect from a point in time before that measure was published, although it may exceptionally be otherwise where the purpose to be achieved so demands and where the legitimate expectations of those concerned are duly respected and, in so far as it follows clearly from the terms, objectives or general scheme of the rules of law concerned, that such effect must be given to them (see, to that effect, Case C-256/07 *Mitsui & Co. Deutschland* [2009] ECR I-1951, paragraph 32 and the case-law cited).

26 By Article 97 of Regulation No 987/2009, the European Union legislature fixed the entry into force of that regulation at 1 May 2010 and there is nothing in the recitals in the preamble thereto or any other provision of that regulation which can be construed as meaning that Article 44 thereof is to take effect from a point in time before that measure was published. On the contrary, it is apparent from Article 87(1) of Regulation No 883/2004, which applies to situations governed by Regulation No 987/2009 pursuant to Article 93 of that regulation, that it does not give rise to any entitlement for the period prior to the date of its application, namely 1 May 2010.

27 Moreover, as observed by the Advocate General in point 40 of his Opinion, it should be borne in mind that, when the DNR adopted the decisions contested in the main proceedings, refusing to take account of Mrs Reichel-Albert's child-raising periods at issue in those proceedings, Regulation No 987/2009 was not yet applicable.

28 Consequently, Article 44 of Regulation No 987/2009 is not applicable ratione temporis to the facts at issue in the main proceedings.

29 In those circumstances, it is in principle the European Union rules governing the coordination of national social security schemes as resulting from Regulation No 1408/71, interpreted in the light of the relevant FEU Treaty provisions, in particular those relating to the free movement of persons as referred to by the referring court in its decision, which must be applied to the facts at issue in the main proceedings.

30 However, since Regulation No 1408/71 does not lay down any specific rules applicable to the crediting of child-raising periods completed in another Member State for the purpose of an old-age pension, the questions referred by the national court must be understood as asking, in essence, whether, in a situation such as that at issue in the main proceedings, Article 21 TFEU must be interpreted as requiring the competent institution of a first Member State, for the purposes of granting an old-age pension, to take account of child-raising periods completed in a second Member State as though those periods had been completed on its national territory by a person who, at the time of the birth of his of her child, had ceased being in employment in that first Member State and had temporarily established his or her residence in the territory of the second Member State, although without being employed as an employee or self-employed person.

The two questions

31 It is necessary, first, to determine the legislation of the Member State under which it is appropriate to define or accept as periods equivalent to proper periods of insurance those periods spent by the applicant in the main proceedings in raising her children in Belgium between 1981 and 1986 and, second, should it turn out to be the German legislation which is applicable, to determine whether the procedure for taking into account child-raising periods provided for under that legislation is compatible with Article 21 TFEU.

32 As rightly pointed out by the German Government at the hearing in respect of the applicable legislation, the right to have child-raising periods taken into account can be based only on the statutory provisions of the Member State to whose law the person concerned was subject at the time when his or her child was born.

33 It is apparent from the case-file for the main proceedings that Mrs Reichel-Albert, after having resided, worked and contributed to the old-age pension scheme in Germany until 30 June 1980, transferred her residence to Belgium, where she continued to receive unemployment benefits until 30 October 1980 and gave birth to two children, after which, on 1 July 1986, she officially returned with her family to Germany, where she resumed regular employment.

34 In those circumstances, even if it were necessary to take account of Article 13(2)(f), inserted into Regulation No 1408/71 by Regulation No 2195/91, that is to say many years after completion by Mrs Reichel-Albert of child-raising periods in Belgium, that provision would still not be relevant in the circumstances of the main proceedings as regards taking into account child-raising periods for the purposes of old-age insurance (see, to that effect, *Kauer*, paragraph 31).

35 The fact that a person like Mrs Reichel-Albert worked and contributed in only one Member State, both before and after temporarily transferring her place of residence, solely on family-related grounds, to another Member State where she never worked or contributed, allows a sufficiently close link to be established between those child-raising periods and the periods of insurance completed by virtue of the pursuit of a gainful occupation in the first Member State under consideration (see, to that effect, *Elsen*, paragraphs 25 to 28, and *Kauer*, paragraph 32). It was indeed on account of completion of those latter periods that Mrs Reichel-Albert requested the DRN to take account of periods spent in raising her children during a break in her working career.

36 Consequently, the German legislation is applicable in a situation such as Mrs Reichel-Albert's and, as regards the crediting of those periods of child-rearing for the purposes of old-age insurance, Mrs Reichel-Albert cannot be regarded as coming under the jurisdiction of her Member State of residence during the periods concerned (see, to that effect, *Elsen*, paragraph 28).

37 Regarding the procedure for taking into account the child-raising periods, an assessment must be made of the compatibility, in the light of Article 21 TFEU, of national provisions such as those found in Paragraphs 56 and 57 of the SGB VI and pursuant to which, for the purposes of the granting of an old-age pension by the competent institution of a Member State, child-raising periods completed outside the territory of that Member State, unlike those completed in the national territory, are not taken into account unless, inter alia, the child-raising parent has habitually resided abroad with his or her child and during the period devoted to child-raising or immediately before the birth of the child has completed periods of contribution by virtue of an activity carried on there as an employed or self-employed person.

38 In this respect it is important to bear in mind that, although Member States retain the power to organise their social security schemes, they must none the less, when exercising that power, observe European Union law and, in particular, the provisions of the Treaty on freedom of movement for citizens as guaranteed by Article 21 TFEU (see, to that effect, *Elsen*, paragraph 33, and Case C-212/06 *Gouvernement de la Communauté française and Gouvernement wallon* [2008] ECR I-1683, paragraph 43).

39 More specifically, the Court, in paragraph 34 of *Elsen*, took the opportunity to state, in respect of an earlier version of the provisions at issue in the main proceedings, that such provisions are disadvantageous to European Union nationals who have exercised their right to move and reside freely in the Member States, as guaranteed by Article 21 TFEU.

40 In a situation such as Mrs Reichel-Albert's, the provisions in question lead to a result where child-raising persons who have not completed periods of compulsory contribution by virtue of an activity carried on as an employed or self-employed person during the raising or immediately before the birth of the child is not entitled to have taken into account, for the purpose of determining the amount of their pension, their child-raising periods solely because they temporarily established their residence in the territory of another Member State, even though they were not employed as an employee or self-employed person in that second Member State.

41 In so doing, such persons are accorded, in the Member State of which they are nationals, treatment less favourable than that which they would have enjoyed had they not availed themselves of the opportunities offered by the Treaty in relation to freedom of movement (see Case C-503/09 *Stewart* [2011] ECR I-6497, paragraph 83 and the case-law cited).

42 National legislation which places some of its nationals at a disadvantage simply because they have exercised their freedom to move and to reside in another Member State thereby gives rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move (Case C-520/04 *Turpeinen* [2006] ECR I-10685, paragraph 22).

43 Moreover, it has not been established or even argued by the Member State concerned that legislation such as that at issue in the main proceedings can be justified where it is based on objective considerations and is proportionate to the legitimate objective of the national provisions (see, to that effect, Case C-391/09 *Runevič-Vardyn and Wardyn* [2011] ECR I-3787, paragraph 83 and the case-law cited).

44 Consequently, it must be held that, in a context such as that at issue in the main proceedings, the fact of precluding child-raising periods completed outside the national territory from being taken into account, as provided for in Paragraphs 56 and 57 of the SGB VI, is contrary to Article 21 TFEU.

45 In those circumstances, having regard to the foregoing considerations the answer to the questions referred is that in a situation such as that at issue in the main proceedings, Article 21 TFEU must be interpreted as meaning that it requires the competent institution of a first Member State, for the

purposes of granting an old-age pension, to take account of child-raising periods completed in a second Member State as though those periods had been completed on its national territory by a person who pursued employed or self-employed activity only in that first Member State and who, at the time of the birth of his or her child, had temporarily stopped working and had, solely on family-related grounds, established his or her place of residence in the territory of the second Member State.

Costs

46 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 (Third Chamber) hereby rules:

In a situation such as that at issue in the main proceedings, Article 21 TFEU must be interpreted as meaning that it requires the competent institution of a first Member State, for the purposes of granting an old-age pension, to take account of child-raising periods completed in a second Member State as though those periods had been completed on its national territory by a person who pursued employed or self-employed activity only in that first Member State and who, at the time of the birth of his of her child, had temporarily stopped working and had, solely on family-related grounds, established his or her place of residence in the territory of the second Member State.

[Signatures]