



Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

19 September 2013*

(Social security — Regulation (EEC) No 1408/71 — Agreement between the European Community and the Swiss Confederation — Swiss nationals residing in Switzerland and working in Luxembourg — Grant of a parental leave allowance — Concept of a ‘family benefit’)

In Joined Cases C-216/12 and C-217/12,

REQUESTS for a preliminary ruling under Article 267 TFEU from the Cour de cassation (Luxembourg), made by decisions of 26 April 2012, received at the Court on 8 May 2012, in the proceedings

Caisse nationale des prestations familiales

v

Fjola Hliddal (C-216/12),

Pierre-Louis Bornand (C-217/12),

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, A. Rosas (Rapporteur), E. Juhász, 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 M. Thewes, avocat,
- Ms Hliddal and Mr Bornand, by C. Erpelding, avocate,
- the European Commission, by V. Kreuschitz and D. Martin, 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 These requests for a preliminary ruling concern the interpretation of Articles 1(u)(i) and 4(1)(h) of Regulation (EEC) No 1408/71 of the Council 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) and as amended by Council Regulation (EC) No 1606/98 of 29 June 1998 (OJ 1998 L 209, p. 1) ('Regulation No 1408/71').
- 2 The requests have been made in proceedings between the Caisse nationale des prestations familiales (National Family Benefits Fund; 'the CNFP') and Ms Hliddal and Mr Bornand respectively, both of whom are resident in Switzerland and employed in Luxembourg, concerning the CNPF's refusal to grant a parental leave allowance in either case.

Legal context

European Union ('EU') law

- 3 Article 1 of Regulation No 1408/71 lists the definitions applicable to the area of law governed by that regulation.
- 4 Under Article 1(u) of that regulation:
 - '(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.'
- 5 Article 4(1)(h) of Regulation No 1408/71 states that the regulation is to apply to all legislation concerning the family benefits branch of social security.
- 6 Article 5 of Regulation No 1408/71 provides:

'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.'
- 7 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;

...'

8 Article 73 of Regulation No 1408/71 is worded as follows:

'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.'

9 Article 8 of the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons, signed in Luxembourg on 21 June 1999 and approved on behalf of the European Community by Decision 2002/309/EC, Euratom of the Council and of the Commission of 4 April 2002 as regards the Agreement on Scientific and Technological Cooperation (OJ 2002 L 114, p. 1) ('the EC-Swiss Agreement') provides:

'The Contracting Parties shall make provision, in accordance with Annex II, for the coordination of social security systems with the aim in particular of:

- (a) securing equality of treatment;
- (b) determining the legislation applicable;
- (c) aggregation, for the purpose of acquiring and retaining the right to benefits, and of calculating such benefits, all periods taken into consideration by the national legislation of the countries concerned;
- (d) paying benefits to persons residing in the territory of the Contracting Parties;
- (e) fostering mutual administrative assistance and cooperation between authorities and institutions.'

10 Article 1 of Annex II to the EC-Swiss Agreement, which concerns the coordination of social security schemes, provides:

'1. The contracting parties agree, with regard to the coordination of social security schemes, to apply among themselves the Community acts to which reference is made, as in force at the date of signature of the Agreement and as amended by Section A of this Annex, or rules equivalent to such acts.

2. The term "Member State(s)" contained in the acts referred to in Section A of this Annex shall be understood to include Switzerland in addition to the States covered by the relevant Community acts.'

11 Section A of that annex refers, inter alia, to Regulation No 1408/71.

12 It should be noted 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), which became applicable on 1 May 2010, the date from which Regulation No 1408/71 was repealed. Annex II to the EC-Swiss Agreement has been updated by Decision No 1/2012 of the Joint Committee established under the Agreement between the European Community and its Member States, of the one part, and the Swiss Confederation, of the other, on the free movement of persons of 31 March 2012 replacing Annex II to that Agreement on the coordination of social security schemes (OJ 2012 L 103, p. 51), which came into force on 1 April 2012. Annex II to the EC-Swiss Agreement now refers to Regulation No 883/2004. However, as the material time for the purposes of the main proceedings pre-dates the entry into force of that decision, Regulation No 1408/71 remains applicable *ratione temporis* to the main proceedings by reason of the

facts that (i) under Article 90(1) of Regulation No 883/2004, Regulation No 1408/71 is to remain in force and continue to have legal effect for the purposes of, inter alia, the EC-Swiss Agreement for as long as that agreement has not been amended and (ii) point 3 of Section A of Annex II to the EC-Swiss Agreement, as amended, maintains the reference to Regulation No 1408/71 ‘when cases are concerned which occurred in the past’.

Luxembourg law

13 Article L. 234-43(1) of the Code du Travail (Employment Code) provides:

‘A form of special leave, known as “parental leave”, is hereby introduced, whereby leave shall be granted by reason of the birth or the adoption of one or more children in respect of whom family allowances are paid and who, with respect to the person claiming parental leave, satisfy the conditions laid down in the second and third paragraphs of Article 2 of the amended Law of 19 June 1985 on family allowances and creating the Caisse nationale des prestations familiales, so long as those children have not reached five years of age.

Any person (“parent”) may claim parental leave so long as that person:

- has an official address and resides continuously in Luxembourg or is covered by the Community regulations;
- is lawfully employed in a workplace situated in the territory of the Grand Duchy of Luxembourg at the time of the birth or the adoption of the child or children concerned and has been continuously employed for at least the 12 month-period immediately preceding the commencement date of the parental leave period by one and the same employer which is itself lawfully established in the Grand Duchy of Luxembourg, under an employment or apprenticeship contract, with monthly working hours which are equal to at least half of the working hours normally applicable to employees of that undertaking under statute or by virtue of an industrial agreement, and who retains that contract throughout the parental leave period;
- is insured on a compulsory and continuous basis as an employee or apprentice pursuant to Article 1(1)(1), (2) and (10) of the Social Insurance Code;
- raises in his or her home the child or children concerned from the time of the birth or the adoption if parental leave is claimed under Article L. 234-45(3), or from – at the latest – the date laid down in Article L. 234-46(2) for notification of a request for parental leave if that leave is claimed under Article L. 234-45(4), and his or her main activity throughout the parental leave period is raising that child or those children;
- carries on no occupational activity while taking full-time parental leave, or, if taking part-time parental leave, carries on one or more occupational activities on a part-time basis, but in relation to which the total hours worked per month, including any overtime, do not exceed half of the working hours normally applicable to employees of that undertaking under statute or by virtue of an industrial agreement.’

14 Article 306 of the Code de la Sécurité Sociale (Social Security Code) provides:

‘1. During any parental leave period granted pursuant to Articles L. 234-43 to L. 234-49 of the Code du Travail, Articles 29a to 29f of the amended Law of 16 April 1979 laying down the general regulations applicable to State officials, and Articles 30a to 30f of the amended Law of 24 December 1985 laying down the general regulations applicable to municipal officials, pay shall be replaced by a

fixed monetary allowance (“the allowance”), set at EUR 1 778.31 per month for full-time parental leave and EUR 889.15 per month for part-time parental leave. It shall be paid on a monthly basis throughout any parental leave period provided for in this Chapter.

...

2. A self-employed worker shall also be entitled to the allowance throughout a parental leave period which has been granted by reason of the birth or the adoption of one or more children in respect of whom family allowances are paid and who, with respect to the person claiming parental leave, satisfy the conditions laid down in Article 270(2) and (3), so long as those children have not reached five years of age, provided that that person:

- (a) has an official address and resides continuously in Luxembourg or is covered by the Community regulations;
- (b) is lawfully established in the territory of the Grand Duchy of Luxembourg at the time of the birth or the adoption of the child or children concerned;
- (c) is insured on a compulsory and continuous basis as a self-employed worker for at least the 12-month period immediately preceding the commencement date of the parental leave period pursuant to Article 1(1)(4), (5) and (10) of this Code;

...’

15 Article 308 of that code states:

‘1. The allowance granted for the leave taken immediately following maternity or adoption leave may not be combined with a parenting allowance, an equivalent non-Luxembourg benefit or a non-Luxembourg benefit payable in connection with parental leave which has been granted in respect of the same child or children, with the exception of an extended parenting allowance granted in respect of a group of three or more children or a disabled child, or an equivalent non-Luxembourg benefit.

2. In the event that, within the first two years of the child’s life, one of the parents applies for and accepts, notwithstanding the prohibition on combining allowances and even after the allowance ceases to be paid, a non-Luxembourg benefit as referred to in the previous paragraph, the monthly payments already made in connection with the allowance shall be recovered. Where it is combined with a parenting allowance as provided for in Article 299, the parental leave allowance shall be maintained and the parenting allowance already paid shall be offset against the monthly payments due in respect of the parental leave allowance. Where this amount cannot be offset, it shall be recovered.

3. A parent who has received a parenting allowance or an equivalent non-Luxembourg benefit shall not be entitled, in respect of the same child, to the allowance which is granted in respect of leave (taken subsequently) until the child has reached five years of age.

4. The allowance which is granted in respect of leave (taken subsequently) until the child has reached five years of age may not be paid at the same time as a parenting allowance or an equivalent non-Luxembourg benefit which has been claimed by the other parent in respect of the same child or children, with the exception of an extended parenting allowance granted in respect of a group of three or more children or a disabled child, or an equivalent non-Luxembourg benefit. In the event that both benefits are claimed in respect of the same period, only the parental leave allowance shall be paid. Monthly payments already made in connection with a parenting allowance or an equivalent

non-Luxembourg benefit and combined with the parental leave allowance shall be offset against the monthly payments due in respect of the latter allowance. Where this amount cannot be offset, it shall be recovered.

5. In the event that two benefits are claimed at the same time by the same parent in respect of two different children, the monthly parenting allowance payments accrued during the parental leave period shall be suspended. The amount of an equivalent allowance paid on a monthly basis under a non-Luxembourg scheme shall be deducted from the monthly payment of the parental leave allowance for up to six monthly payments per child. Where this amount cannot be offset, it shall be recovered.'

The disputes in the main proceedings and the question referred for a preliminary ruling

- 16 Ms Hliddal and Mr Bornand, both Swiss nationals, reside in Switzerland with their respective families and work as airline captains for an airline in Luxembourg.
- 17 The Governing Board of the CNPF refused to grant either of them a parental leave allowance on the ground that they did not satisfy the conditions laid down in Article L. 234-43 of the Code du Travail, pursuant to which a person claiming parental leave must have an official address and reside continuously in Luxembourg or be covered by the Community regulations.
- 18 By judgments delivered on 17 August 2010 regarding the appeals filed by Ms Hliddal and Mr Bornand against the decisions of the Governing Board of the CNPF, the Conseil arbitral des assurances sociales (Social Insurance Arbitration Board) reversed the decisions, upheld the appeals and referred both cases back to the CNPF.
- 19 The CNPF brought an appeal against those judgments before the Conseil supérieur de la sécurité sociale (Higher Council for Social Security); by judgments delivered on 16 March 2011, that body upheld the judgments under appeal.
- 20 The CNPF has appealed on a point of law before the Cour de Cassation (Court of Cassation), the referring court, against the judgments of 16 March 2011, putting forward six pleas in cassation which, with the exception of the sixth plea, are rejected by that court in its orders for reference.
- 21 In respect of the sixth plea raised by the CNPF, alleging infringement – otherwise refusal to apply, otherwise misapplication or otherwise misinterpretation – of Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71, the Cour de cassation observes that, on analysing the aims underlying the parental leave allowance and the conditions for granting it, the Conseil supérieur de la sécurité sociale came to the conclusion that '[t]he purpose of the parental leave allowance is essentially family-related[:] ... it is basically designed to eliminate or at least alleviate the financial loss resulting from temporary abandonment of an occupational activity and to compensate for the charges inherent in the maintenance, care and education of young children'.
- 22 According to the referring court, the Conseil supérieur de la sécurité sociale added that '[t]he primary purpose of parental leave is not called into question by the fact that it may also, incidentally and ideally, have a positive effect on the employment market in that, depending on the circumstances, it may result in a number of posts being made available which can be taken up by unemployed persons or it may also, because of the arrangements made, ... promote a better distribution of educational tasks between fathers and mothers'.

23 In view of its uncertainty as to whether a benefit such as the parental leave allowance 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 question – which is framed in identical terms in Case C-216/12 and Case C-217/12 – to the Court of Justice for a preliminary ruling:

‘Does a benefit such as the parental leave allowance provided for under Articles 306 to 308 of the [Luxembourg] Code de la Sécurité Sociale constitute a ‘family benefit’ within the meaning of Article 1(u)(i) and Article 4(1)(h) of [Regulation No 1408/71], applicable in accordance with [point 1 of Section A of Annex II to] the [EC-Swiss Agreement] and the Final Act, signed in Luxembourg on 21 June 1999?’

24 By order of the President of the Court of 13 June 2012, Case C-216/12 and Case C-217/12 were joined.

The question referred for a preliminary ruling

25 By its question, the national court asks, in essence, whether Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71 should be interpreted as meaning that a parental leave allowance, such as the allowance provided for under Luxembourg legislation, constitutes a ‘family benefit’ within the meaning of that regulation.

Observations submitted to the Court

26 The CNPF submits, primarily, that the Court must decline jurisdiction to answer the question referred, given that the EC-Swiss Agreement is not applicable. The reason for this, according to the CNPF, is that the Luxembourg legislation on parental leave derives from a statute of 12 February 1999, the purpose of which was to transpose into Luxembourg law Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC (OJ 1996 L 145, p. 4), and a Swiss national cannot rely on national legislation adopted in order to implement Directive 96/34, since no reference to that directive is made in either the EC-Swiss Agreement or the Annexes thereto.

27 In the alternative, the CNPF submits that the parental leave allowance at issue cannot be regarded as a social security benefit. In that connection, it asserts that the decision to grant parental leave – and thereby a right to the parental leave allowance – is made by the employer on an individual basis; it is in part discretionary, and does not follow from a legally defined situation.

28 In addition, the CNPF asserts that the parental leave allowance does not fall within any of the benefit categories listed in Article 4(1) of Regulation No 1408/71.

29 According to the CNPF, that allowance does not constitute a family benefit, but more closely resembles – from the standpoint of Regulation No 1408/71 – an unemployment allowance paid on a voluntary basis during the parental leave period. The parental leave allowance at issue is not a form of income support; nor is it intended to offset family expenses. Rather, that allowance constitutes remuneration payable under the employment contract or, at the very least, dependent upon the existence of that contract, and must be categorised as ‘substitute income’. Nor does the allowance supplement income: it is itself the recipient’s income. It comes to an end with the end of the parental leave, even though the expenses linked to the child’s presence remain unchanged.

30 According to the CNPF, the following factors also indicate that the parental leave allowance at issue should not be classified as a ‘family benefit’ within the meaning of Regulation No 1408/71: (i) if both parents work, the allowance can be paid both to the father and to the mother in respect of one and

the same child, and the amount represented by that allowance, before tax, is higher than the minimum salary received by an unqualified person; (ii) the right to parental leave under Luxembourg legislation is granted only on an individual basis to parents, in their capacity as workers, and no other member of their family is entitled to such leave; and (iii) the Grand Duchy of Luxembourg has made no declaration under Article 5 of Regulation No 1408/71.

- 31 Ms Hliddal and Mr Bornand contend that the question referred by the national court should be answered in the affirmative.
- 32 First, they maintain that the parental leave allowance does indeed constitute a social security benefit as it is granted, without any individual assessment of personal needs, on the basis of a legally defined situation, that is to say, once the person claiming the allowance has demonstrated entitlement to parental leave. Although it is for the employer to determine whether the conditions for granting parental leave are met, the assessment as to whether the conditions for granting the allowance are met is the preserve of the social security body which pays that allowance.
- 33 Ms Hliddal and Mr Bornand also maintain that the parental leave allowance is a family benefit since, in the case of every parent bound by an employment contract, it is granted upon the birth or the adoption of one or more children whom the parent in receipt of the allowance must raise and care for in his or her home throughout the parental leave period. The direct object and the main effect of the parental leave allowance is to offset family expenses: it is designed to enable one of the parents to devote himself or herself to the raising of a young child and, specifically, it is intended as remuneration for bringing up a child, and to offset other costs involved in caring for and raising a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from an occupational activity. Lastly, Ms Hliddal and Mr Bornand argue that the fact that the CNPF has been chosen as the body which pays the allowance lends support to the argument that it is a family allowance.
- 34 As a preliminary point, the European Commission states that the referring court has not raised before the Court the issue of Swiss nationals benefiting under the Luxembourg legislation at issue in the main proceedings and, accordingly, the Court is not called upon to rule on that matter.
- 35 As regards the question referred by the national court, the Commission argues that the parental leave allowance provided for under the Luxembourg legislation constitutes a social security benefit, not ‘pay’ as defined in EU law. In the context of freedom of movement for workers, the concept of ‘pay’ presupposes, as a general rule, the existence of a current employment relationship. However, where a worker is on parental leave, the employment relationship is suspended. Moreover, in the present case, the parental leave allowance is financed by the interest charged on revenue from the social contribution levied on fuel, while any additional funding is to be provided out of the State budget. Thus, the allowance is not paid by the employer itself.
- 36 The Commission also argues that the allowance is a ‘family benefit’ within the meaning of Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71. In that regard, the Commission makes reference, *inter alia*, to the fact that, under Article 308 of the Code de la Sécurité Sociale, the parental leave allowance may not be combined with a parenting allowance or with an allowance granted abroad in connection with parental leave granted in respect of the same child. Provisions of that nature, intended to prevent overlapping, are characteristic of family benefits. Furthermore, the allowance is set at a fixed amount independent of any salary previously received by the worker in question.

The Court's reply

- 37 As a preliminary point, it should be borne in mind that the CNPF disputes the applicability of the EC-Swiss Agreement to the cases before the referring court, thereby asserting that the Court lacks jurisdiction to answer the question referred.

- 38 As the national court rightly points out, by expressly referring to Regulation No 1408/71, the EC-Swiss Agreement extends the personal scope of that regulation to cover Swiss nationals. By its question regarding the interpretation of Regulation No 1408/71, the national court seeks to ascertain whether a parental leave allowance, such as the allowance at issue in the case before it, falls within the material scope of Regulation No 1408/71, which would mean that the allowance was covered by the reference to that regulation in the EC-Swiss Agreement and could be claimed by a Swiss national. In that regard, moreover, it is of no relevance to the disputes before the referring court that the EC-Swiss Agreement does not refer to Directive 96/34, the directive which, according to the CNPF, the Law of 12 February 1999 introducing parental leave and leave for family reasons was intended to transpose into Luxembourg law.
- 39 In those circumstances, the Court has jurisdiction to answer the question referred.
- 40 It must first be determined whether a parental leave allowance falls to be regarded as ‘pay’ within the meaning of Article 157 TFEU or as a ‘social security benefit’ within the meaning of Regulation No 1408/71.
- 41 Under Article 157(2) TFEU, ‘pay’ means ‘the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer’. It is settled case-law that that concept covers any consideration, whether immediate or future, provided that the worker receives it, albeit indirectly, in respect of his employment, from his employer, and irrespective of whether it is received under a contract of employment, by virtue of legislative provisions or on a voluntary basis (see Case C-262/88 *Barber* [1990] ECR I-1889, paragraph 12; Case C-66/96 *Høj Pedersen and Others* [1998] ECR I-7327, paragraph 32; Case C-236/98 *JämO* [2000] ECR I-2189, paragraph 39; and Case C-147/02 *Alabaster* [2004] ECR I-3101, paragraph 42).
- 42 The Court has held that a worker who exercises a statutory right to parenting leave which carries with it a parenting allowance paid by the State is in a specific situation which cannot be assimilated to that of a man or woman who works, since such leave is characterised by the suspension of the employment contract and, accordingly, of the respective obligations of the employer and the worker (see Case C-333/97 *Lewen* [1999] ECR I-7243, paragraph 37, and Case C-537/07 *Gómez-Limón Sánchez-Camacho* [2009] ECR I-6525, paragraph 57).
- 43 In addition, it is not apparent from the case-file that the allowance at issue in the main proceedings is paid, even indirectly, by the employer.
- 44 It follows from the foregoing that the parental leave allowance at issue in the main proceedings does not constitute ‘pay’ within the meaning of Article 157 TFEU.
- 45 Secondly, it must be determined whether a parental leave allowance, such as the allowance provided for under Article 306 of the Code de la Sécurité Sociale, meets the criteria identified in the case-law as enabling a benefit to be classified as a ‘social security benefit’ within the meaning of Regulation No 1408/71.
- 46 It should be stressed at the outset that the fact that the Luxembourg Government has not made a declaration under Article 5 of Regulation No 1408/71 specifying the parental leave allowance provided for under Article 306 of the Code de la Sécurité Sociale as being a scheme as referred to in Article 4(1) and (2) of Regulation No 1408/71 is not proof in itself that the allowance does not fall within the scope of that regulation (see, inter alia, Case 35/77 *Beerens* [1977] ECR 2249, paragraph 9, and Case C-85/99 *Offermanns* [1999] ECR I-2261, paragraph 26).

- 47 Furthermore, the way in which a benefit is classified under domestic law is not decisive for the purposes of determining whether or not that benefit falls within the material scope of Regulation No 1408/71 (see Case C-78/91 *Hughes* [1992] ECR I-4839, paragraph 14; Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895, paragraph 17; and *Offermanns*, paragraph 37).
- 48 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, *Hughes*, paragraph 15; Case C-286/03 *Hosse* [2006] ECR I-1771, paragraph 37; Joined Cases C-396/05, C-419/05 and C-450/05 *Habelt and Others* [2007] ECR I-11895, paragraph 63; and Case C-228/07 *Petersen* [2008] ECR I-6989, paragraph 19).
- 49 Although the CNPF claims that the legal situation giving rise to the right to the parental leave allowance ultimately stems from the employer's decision to grant – or not to grant – parental leave, the fact remains that the allowance itself is granted on the basis of a legally defined position, without any individual and discretionary assessment of personal needs.
- 50 In that regard – and as Ms Hliddal and Mr Bornand point out – it is necessary to distinguish between, on the one hand, the conditions for granting parental leave and, on the other, the conditions governing the granting of the parental leave allowance where it is established that the legally defined position has come about. Only the latter set of conditions is taken into consideration for the purposes of classifying the benefit.
- 51 Where a parental leave allowance, such as the allowance at issue in the main proceedings, satisfies the first of the two conditions mentioned in paragraph 48 above, it is also necessary to assess whether, in the light of the constituent elements of that allowance – in particular, its purpose and the conditions for its being granted – it constitutes a 'family benefit' within the meaning of Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71, or whether it is more in the nature of substitute income akin to unemployment benefit.
- 52 A benefit such as the parental leave allowance at issue in the main proceedings does not constitute an unemployment benefit. The Court has held that, in order to distinguish between the various categories of social security benefit, 'the risk covered' by each benefit must be taken into consideration. Thus, an unemployment benefit covers the risk associated with the loss of revenue suffered by a worker following the loss of his employment although he is still able to work. A benefit granted if that risk, namely loss of employment, materialises and which is no longer payable if that situation ceases to exist as a result of the claimant's engaging in paid employment must be regarded as constituting an unemployment benefit (see Case C-406/04 *De Cuyper* [2006] ECR I-6947, paragraph 27).
- 53 However, that is not the position in the case of a person receiving a parental leave allowance such as the allowance at issue in the main proceedings. That person has not lost his employment, but has merely decided to suspend the employment relationship.
- 54 It should also be borne in mind that, under Article 1(u)(i) of Regulation No 1408/71, '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 *Offermanns*, paragraph 38).
- 55 The phrase 'to meet family expenses' which is used in that provision 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).

- 56 The Court has also held that the purpose underlying a parenting allowance which is designed to enable one of the parents to devote himself or herself to the raising of a young child and which is intended, specifically, as remuneration for bringing up that child, and to meet other costs involved in caring for and raising a child and, as the case may be, to mitigate the financial disadvantages entailed in giving up income from full-time employment is ‘to meet family expenses’ within the meaning of Article 1(u)(i) of Regulation No 1408/71 (see, to that effect, *Hoefer and Zachow*, paragraphs 23 and 25).
- 57 It follows from paragraph 27 of the judgment in *Hoefer and Zachow* that such a benefit must be treated as a ‘family benefit’ within the meaning of Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71 (see Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraph 60).
- 58 Specifically, in relation to a career break allowance granted, subject to certain conditions, to a worker taking a break from his or her career using parental leave, the Court has held that that type of benefit, which is similar to the parental leave allowance at issue in the main proceedings, must be treated as a family benefit (see judgment of 7 September 2004 in Case C-469/02 *Commission v Belgium*, not published in the ECR, paragraph 16).
- 59 It follows from all the foregoing that the parental leave allowance at issue in the main proceedings may not be classified as ‘pay’ within the meaning of Article 157 TFEU and that it constitutes a social security benefit with the characteristics of a ‘family benefit’ within the meaning of Regulation No 1408/71.
- 60 Accordingly, the answer to the question referred is that Articles 1(u)(i) and 4(1)(h) of Regulation No 1408/71 must be interpreted as meaning that a parental leave allowance, such as the allowance provided for under Luxembourg legislation, constitutes a ‘family benefit’ within the meaning of that regulation.

Costs

- 61 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 Regulation (EEC) No 1408/71 of the Council 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 and as amended by Council Regulation (EC) No 1606/98 of 29 June 1998, must be interpreted as meaning that a parental leave allowance, such as the allowance provided for under Luxembourg legislation, constitutes a ‘family benefit’ within the meaning of that regulation.

[Signatures]