



Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

22 October 2015*

(Reference for a preliminary ruling — Social security — Regulation (EC) No 883/2004 — Article 67 — Regulation (EC) No 987/2009 — Article 60(1) — Payment of family benefits where parents are divorced — Definition of the ‘person concerned’ — Law of a Member State providing for the payment of family benefits to the parent who has taken the child into his household — Residence of that parent in another Member State — Failure of that parent to claim family benefits — Possibility of entitlement of the other parent to claim those family benefits)

In Case C-378/14,

REQUEST for a preliminary ruling under Article 267 TFEU from the Bundesfinanzhof (Federal Finance Court, Germany), made by decision of 8 May 2014, received at the Court on 7 August 2014, in the proceedings

Bundesagentur für Arbeit — Familienkasse Sachsen

v

Tomislaw Trapkowski,

THE COURT (First Chamber),

composed of A. Tizzano, Vice-President of the Court, acting as President of the First Chamber, F. Biltgen, A. Borg Barthet, M. Berger and S. Rodin (Rapporteur), Judges,

Advocate General: P. Mengozzi,

Registrar: V. Tourrès, Administrator,

having regard to the written procedure and further to the hearing on 17 June 2015,

after considering the observations submitted on behalf of:

- Mr Trapkowski, by C. Rebber, Rechtsanwalt,
- the Netherlands Government, by B. Koopman and M. Bulterman, acting as Agents,
- the Polish Government, by B. Majczyna, acting as Agent,
- the United Kingdom Government, by V. Kaye, acting as Agent, and J. Holmes, Barrister,
- the European Commission, by S. Grünheid and D. Martin, acting as Agents,

* Language of the case: German.

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

Judgment

- 1 This reference for a preliminary ruling concerns the interpretation of Article 60(1), second and third sentences, 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 has been made in proceedings between the Bundesagentur für Arbeit — Familienkasse Sachsen (Federal Employment Agency — Family Allowances Office, Saxony) ('BfA') and Mr Trapkowski concerning the BfA's refusal to pay family benefits for Mr Trapkowski's child who lives with its mother in Poland.

Legal context

EU law

Regulation (EC) No 883/2004

- 3 Article 1 of Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems (OJ 2004 L 166, p. 1, and corrigendum OJ 2004 L 200, p. 1), as amended by Regulation (EU) No 465/2012 of the European Parliament and of the Council of 22 May 2012 (OJ 2009 L 149, p. 4) ('Regulation No 883/2004'), provides:

'For the purposes of this Regulation:

...

- (i) "member of the family" means

(1)

- (i) any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided;

...'

- 4 Article 2(1) of that regulation states:

'This Regulation shall apply to nationals of a Member State, stateless persons and refugees residing in a Member State who are or have been subject to the legislation of one or more Member States, as well as to the members of their families and to their survivors.'

- 5 Article 11(1), (2) and (3) of that regulation is worded as follows:

'1. Persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. Such legislation shall be determined in accordance with this Title.

2. For the purposes of this Title, persons receiving cash benefits because or as a consequence of their activity as an employed or self-employed person shall be considered to be pursuing the said activity. This shall not apply to invalidity, old-age or survivors' pensions or to pensions in respect of accidents at work or occupational diseases or to sickness benefits in cash covering treatment for an unlimited period.

3. Subject to Articles 12 to 16:

(a) a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

...'

6 Article 67 of the regulation provides as follows:

'A person shall be entitled to family benefits in accordance with the legislation of the competent Member State, including for his family members residing in another Member State, as if they were residing in the former Member State. However, a pensioner shall be entitled to family benefits in accordance with the legislation of the Member State competent for his pension.'

7 Article 68(1) of that regulation, entitled 'Priority rules in the event of overlapping', lays down the 'priority rules' where, during the same period and for the same family members, benefits are provided for under the legislation of more than one Member State.

Regulation No 987/2009

8 According to Article 60(1) of Regulation No 987/2009:

'The application for family benefits shall be addressed to the competent institution. For the purposes of applying Articles 67 and 68 of the basic Regulation, the situation of the whole family shall be taken into account as if all the persons involved were subject to the legislation of the Member State concerned and residing there, in particular as regards a person's entitlement to claim such benefits. Where a person entitled to claim the benefits does not exercise his right, an application for family benefits submitted by the other parent, a person treated as a parent, or a person or institution acting as guardian of the child or children, shall be taken into account by the competent institution of the Member State whose legislation is applicable.'

German law

9 Paragraph 64(1) and (2) of the Law on income tax (Einkommensteuergesetz) ('the EStG') provides:

'(1) For each child, family benefits shall be provided to only one person entitled to benefits;

(2) If there are several persons entitled to benefits, family benefits shall be paid to the person who has taken the child into his household. If the child is taken in to the parents' joint household, or into the household of one parent and his or her spouse, foster parents or grandparents, they must decide between themselves who shall receive the benefits ...'

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

10 Mr Trapkowski, resident in Germany, has divorced his wife, who lives in Poland with their child, born in April 2000.

- 11 From January 2011 until October 2012, Mr Trapkowski received unemployment benefit for a certain period. However, from November 2011 until January 2012, and from 1 to 22 February 2012, he was in paid employment in Germany, after which he was paid benefits under German social security law.
- 12 In August 2012, Mr Trapkowski claimed family benefits for his son from the BfA for the period from January 2011 to October 2012. During the period in question, the child's mother, who was in paid employment in Poland, did not receive or apply for family benefits, either under German or Polish law.
- 13 By decision of 3 September 2012, the BfA rejected Mr Trapkowski's claim on the ground that it was principally the child's mother who was entitled to family benefits under German law. The challenge to that decision was also rejected.
- 14 However, the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) upheld Mr Trapkowski's action against the BfA's decision of 3 September 2012 and against the decision rejecting his challenge for that decision. The court held that he was entitled to family benefits under German law, which applied to his situation by virtue of Article 11(1) and (3)(a) of Regulation No 883/2004.
- 15 In addition, the Finanzgericht Düsseldorf (Finance Court, Düsseldorf) held that by virtue of the deeming provision included in Article 60(1), second sentence, of Regulation No 987/2009, Mr Trapkowski's family must be treated as if they resided in Germany. Thus, in the case in the main proceedings, there would have been no conflict as to entitlement for the purposes of Article 68 of Regulation No 883/2004, since the child's mother could not claim family benefits in Poland.
- 16 The Finanzgericht Düsseldorf (Finance Court, Düsseldorf) concluded that Article 60(1) of Regulation No 987/2009 sought only to prevent a person who leaves one Member State to go to another Member State from losing his rights and it is not intended to limit or extend the rights of a person living in the home State.
- 17 The BfA appealed against the decision of the Finanzgericht Düsseldorf (Finance Court, Düsseldorf), arguing that the persons to whom Regulation No 883/2004 applies are subject only to the law of a single Member State. Under German law, family benefits are provided to the person who has taken the child into his household.
- 18 According to the BfA, a combined reading of Article 67(1) of Regulation No 883/2004 and Article 60(1) of Regulation No 987/2009 and the case-law of the Court lead to the conclusion, in the case in the main proceedings, that the main beneficiary of the entitlement to family benefits was, consistently with German law, the child's mother, and not Mr Trapkowski.
- 19 The referring court highlights the fact that under German law family benefits are paid only to an identifiable recipient. Under German law, family benefits are paid to the parent who has taken the child into his household, since general experience shows that the parent having custody of the child bears higher maintenance costs. In that connection, it asks whether the application of EU law, in the case in the main proceedings, might lead to Mr Trapkowski being deprived of only entitlement to family benefits.
- 20 That court observes that the fact that the defendant's ex-wife is not entitled to family benefits in Poland is irrelevant for the decision as to whether Regulation No 883/2004 applies in the case in the main proceedings. In addition, that court points out that under German law, the fact the child's parents are divorced does not prevent them from being treated as members of the family to whom family benefits may be paid.

- 21 Given that the deeming provisions included in Article 60(1) of Regulation No 987/2009 is applicable, the referring court considers that an interpretation according to which the child's mother may be entitled to family benefits, since, in accordance with that deeming provisions, she must be regarded as residing in Germany and the child as living with her, cannot be excluded from the outset, in particular in the light of Article 68 of Regulation No 883/2004.
- 22 If such an interpretation were to be accepted, the referring court asks if Article 60(1), third sentence, of Regulation No 987/2009 precludes the application to the case in main proceedings of Paragraph 64(2) of the EStG, according to which only the parent who has taken the child into his household may claim family benefits, or whether it is appropriate instead to distinguish between the entitlement to claim family benefits — which may be granted to Mr Trapkowski — and the entitlement actually to receive such benefits — which lies exclusively with his ex-wife because the child lives with her.
- 23 Finally, if Article 60(1), third sentence, of Regulation No 987/2009 were to be interpreted as meaning that the entitlement to family benefits is transferred to the parent residing in the home Member State where the first recipient of the benefits, residing in another Member State, has not applied for them, the referring court asks after what period of time must have passed for the first recipient to be regarded as having failed to make an application.
- 24 In those circumstances, the Bundesfinanzhof (Federal Finance Court) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) In a case where a person residing in one Member State (the home State) is entitled to child benefit for children who live in another Member State (abroad) with the other spouse from whom he is separated, is the second sentence of Article 60(1) of Regulation No 987/2009 to be applied in such a way that the deeming provisions that, for the purpose of applying Articles 67 and 68 of Regulation No 883/2004, the situation of the whole family is to be taken into account as if all the persons involved were subject to the legislation of the Member State concerned and residing there, in particular as regards a person's entitlement to claim benefits, leads to the parent residing in the other Member State (abroad) being exclusively entitled to child benefit because the national law of the first Member State provides that where several persons are entitled to child benefit, the benefit is granted to the parent who has taken the child into his or her household?

(2) If the first question is to be answered in the affirmative:

In the situation set out in paragraph 1, is the third sentence of Article 60(1) of Regulation No 987/2009 to be interpreted as meaning that the parent residing in one Member State (the home State) has the right to child benefit under domestic law because the other parent residing in the other Member State (abroad) has not made an application for child benefit?

(3) If, in the situation set out in paragraph 1, the answer to the second question is that the failure of the parent residing in another EU Member State to make an application leads to the transfer of the right to child benefit to the parent residing in the home State:

After what period of time may it be presumed that a parent residing in another EU Member State is not “exercising” his or her right to child benefit within the meaning of the third sentence of Article 60(1) of Regulation No 987/2009, so that the parent residing in the home State has the right to child benefit?

Consideration of the questions referred for a preliminary ruling

Preliminary observations

- 25 In order to answer the questions referred, it must be stated at the outset that a person such as Mr Trapkowski, periodically employed in one Member State, in this case the Federal Republic of Germany, and residing in that State, falls within the scope of Regulation No 883/2004 by virtue of Articles 2(1) and 11(3)(a) thereof.
- 26 Furthermore, it is common ground that the benefits at issue in the main proceedings, which are intended to alleviate the financial burdens involved in the maintenance of children, fall within the concept of ‘family benefits’ within the meaning of Regulation No 883/2004 (see judgments in *Offermanns*, C-85/99, EU:C:2001:166, paragraph 41, and *Lachheb*, C-177/12, EU:C:2013:689, paragraph 35).
- 27 Moreover, as regards the concept of ‘members of the family’ Article 1(1)(i) of Regulation No 883/2004 states that it designates ‘any person defined or recognised as a member of the family or designated as a member of the household by the legislation under which benefits are provided’.
- 28 In the present case, it is apparent from the order for reference that German law determines the persons entitled to family benefits without expressly defining the concept of ‘member of the family’.
- 29 However, as the referring court observes, the entitlement to child benefits is granted, in accordance with German law, to the child’s first degree relatives, whether or not they are married.
- 30 On that basis, that court takes the view that the child at issue in the main proceedings and its mother must be regarded as members of Mr Trapkowski’s family for the purposes of German law, as far as concerns the entitlement to family benefits.
- 31 It is not for the Court of Justice to challenge that finding, based on the national law as interpreted by the national court (see, to that effect, judgment in *Slanina*, C-363/08, EU:C:2009:732, paragraph 27).
- 32 As regards the applicability of the priority rules laid down in Article 68(1) of Regulation No 883/2004 it should be recalled that, according to the settled case-law of the Court, for a finding that such overlapping is present in a given case, it is not enough for such benefits to be due in the relevant child’s Member State of residence and to be, in parallel, merely capable of being due in another Member State, where one of the parents of that child works (judgment in *Schwemmer*, C-16/09, EU:C:2010:605, paragraph 52 and the case-law cited).
- 33 Therefore, as the mother of the child concerned in the main proceedings could not claim family benefits in Poland, the priority rules do not apply in the case in the main proceedings.

The first question referred

- 34 By its first question, the referring court asks essentially, whether Article 60(1), second sentence, of Regulation No 987/2009 must be interpreted as meaning that the deeming provision included there might lead to granting entitlement to family benefits to a person not residing on the territory of the Member State responsible for paying those benefits.
- 35 In order to answer that question, it should be recalled, first of all, that the deeming provisions included in Article 67 of Regulation No 883/2004 has the effect that a person may claim family benefits for members of his family who reside in a Member State other than that responsible for paying those benefits, as if they resided in that Member State.

- 36 Second, Article 60(1), second sentence, of Regulation No 987/2009 provides that, for the purposes of the application, in particular, of Regulation No 883/2004, the situation of the whole family is taken into consideration as if all the persons concerned were subject to the law of the Member State concerned and were resident there, in particular as regards the entitlement of a person to claim family benefits.
- 37 Third, Article 60(1), third sentence, of Regulation No 987/2009 states that, where a person entitled to claim the benefits does not exercise his right, 'the other parent' is one of the persons or institutions authorised to apply for such benefits.
- 38 It is apparent from a combined reading of Article 67 of Regulation No 883/2004 and Article 60(1) of Regulation No 987/2009, first, that a person may claim family benefits for members of his family who reside in a Member State other than that responsible for paying those benefits and, second, that the possibility to apply for family benefits is granted not only to persons who reside in the Member State required to pay the family benefits, but also to all the 'persons concerned', who may claim those benefits, including the parents of the child for whom the benefits are claimed.
- 39 Accordingly, given that the parents of the child for whom family benefits are claimed fall within the definition of 'persons concerned' within the meaning of Article 60(1) of Regulation No 987/2009, authorised to claim payment of those benefits, it is conceivable that a parent who resides in a Member State other than that required to pay those benefits is the person entitled to receive those benefits, if all the other conditions laid down by national law are also met.
- 40 It is for the competent national authority to determine the persons who, in accordance with national law, have a right to family benefits.
- 41 It is clear from all of the foregoing that Article 60(1), second sentence, of Regulation No 987/2009 must be interpreted as meaning that the deeming provision included there may lead to the grant of entitlement to family benefits to a person who does not reside in the Member State responsible for paying those benefits, where all the other conditions for the grant of those benefits laid down by national law are met, a matter which is for the referring court to determine.

The second question referred

- 42 By its second question, the referring court asks essentially whether Article 60(1), third sentence, of Regulation No 987/2009 must be interpreted as meaning that the parent of the child for whom family benefits are paid, who resides in the Member State required to pay those benefits, must be granted entitlement to those benefits because the other parent, who resides in another Member State, has not made an application for family benefits.
- 43 To answer that question, it should be recalled, as a preliminary point, that Regulations No 987/2009 and No 883/2004 do not determine the persons entitled to family benefits, even though they lay down the rules which enable the persons entitled to claim those benefits to be determined.
- 44 The persons entitled to family benefits are, as is clear from Article 67 of Regulation No 883/200, to be determined in accordance with national law.
- 45 Furthermore, it must be observed that Article 60(1), third sentence, of Regulation No 987/2009 provides that where a person entitled to claim the benefits does not exercise his right, the competent institutions of the Member States must take into account such applications made by the persons or institutions mentioned in that provision which include the 'other parent'.

- 46 First, it appears both from the wording and the general scheme of Article 60(1) of Regulation No 987/2009 that a distinction must be made between making a claim for family benefits and the right to receive such benefits.
- 47 Second, it is also clear from the wording of that article that it is sufficient if one of the persons able to claim the benefit of those family benefits makes an application for such benefits, so that the competent institution of the Member State must take that application into consideration.
- 48 However, EU law does not preclude such an institution, by applying national law, from finding that the person entitled to receive child benefits is a person other than the person who made the application for those benefits.
- 49 Therefore, where all the conditions for the grant of child benefits have been met and those benefits are actually granted, the issue as to which parent is regarded under national law as the person entitled to receive such benefits is irrelevant (see, to that effect, judgment in *Hoefer and Zachow*, C-245/94 and C-312/94, EU:C:1996:379, paragraph 37).
- 50 It is clear from all of the foregoing that Article 60(1), third sentence, of Regulation No 987/2009 must be interpreted as meaning that there is no requirement that a parent of the child for whom child benefits are paid, who resides in the Member State obliged to pay those benefits, must be granted entitlement to those benefits on the ground that the other parent, who resides in another Member State, has not applied for them.
- 51 In view of the answers given to the first two questions, it is unnecessary to reply to the third question.

Costs

- 52 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 (First Chamber) hereby rules:

1. **Article 60(1), second sentence, 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 must be interpreted as meaning that the deeming provision included there may lead to the grant of entitlement to family benefits for a person who does not reside in the Member State responsible for paying those benefits where all the other conditions for the grant of those benefits laid down by national law are met, a matter which is for the referring court to determine.**
2. **Article 60(1), third sentence, of Regulation No 987/2009 must be interpreted as meaning that there is no requirement that the parent of the child for whom child benefits are paid, who resides in the Member State obliged to pay those benefits, must be granted entitlement to those benefits on the ground that the other parent, who resides in another Member State, has not applied for them.**

[Signatures]