SUMMARY

ECJ 30 June 2011, case C-388/09 (Joao Filipe da Silva Martins - v - Bank Betriebskrankenkasse- Pflegekasse), Social insurance

<p>Articles 15 and 27 of Council Regulation (EEC) No 1408/71 […] must be interpreted as not precluding a person in a situation such as that at issue in the main proceedings, who draws retirement pensions from retirement insurance funds both of his Member State of origin and of the Member State in which he spent most of his working life and has moved from that Member State to his Member State of origin, from continuing, by reason of optional continued affiliation to a separate care insurance scheme in the Member State in which he spent most of his working life, to receive a cash benefit corresponding to that affiliation, in particular where cash benefits relating to the specific risk of reliance on care do not exist in the Member State of residence, that being a matter for the referring court to ascertain.</p>
<p>If, contrary to that hypothesis, cash benefits relating to the risk of reliance on care are provided for under the legislation of the Member State of residence, but only at a lower level than that of the benefits relating to that risk from the other pension-paying Member State, Article 27 of Regulation No 1408/71 […] must be interpreted as meaning that such a person is entitled, at the expense of the competent institution of the latter State, to additional benefits equal to the difference between the two amounts.</p>

Facts

Regulation 1408/71 (the 'Regulation') was adopted in 1971 with a view to coordinating the different national social insurance schemes in order to promote cross-border mobility. At the time it was common for elderly and disabled people requiring personal assistance in respect of hygiene, meals, mobility, household chores, etc. to be taken care of, for example, by relatives and neighbours. The provision of such personal assistance was not covered by compulsory social insurance in any of the Member States. As increasing numbers of elderly people came to lack assistance by relatives, neighbours, etc., some Member States introduced new forms of compulsory social insurance to cover this need. Germany did so in 1995. In that year it introduced the Personal Assistance Insurance Act (Pflegeversicherungsgesetz). Employers, employees and retired employees pay a contribution to a health insurance institution (Krankenkasse). An employee or former employee who has been insured for a certain minimum period (formerly five years, now two years) and who requires personal assistance is eligible to receive certain monthly payments with which he can purchase any personal assistance he wishes. At the time relevant in this case the 'class I' benefits (for those requiring the least intensive assistance) amounted to € 205 per month.

Because such types of social insurance did not exist in 1971, Regulation 1408/71 does not coordinate the Member States' rules in respect of personal assistance insurance schemes. However, in Molenaar (case C-160/96) and Jauch (case C-215/99) the ECJ qualified personal assistance benefits as sickness benefits within the meaning of Article 4(1)(a) of the Regulation, thereby in effect expanding the Regulation's scope. The new Regulation 883/2004, which replaced the Regulation on 1 May 2010, does cover personal assistance insurance, but it was not yet in place at the time of the dispute in this case.

Mr Da Silva Martins was a Portuguese national who, after working in his home country for a short period, went to work in Germany. He paid personal assistance contributions from 1 January 1995, the date on which the Personal Assistance Insurance Act took effect. He retired in September 1996 at age 61 and was granted German retirement benefits in the amount of approximately | 700 per month. As a retiree living in Germany, Mr Da Silva Martins remained compulsorily insured under the Personal Assistance Insurance Act. Accordingly, when in August 2001 he began requiring personal assistance, he was awarded class I personal assistance benefits, in the amount of approximately | 205 per month. As from May 2000, when he turned 65, he also received Portuguese retirement benefits, in the amount of approximately | 150 per month. Thus, he was in receipt of three state benefits: German retirement benefits, Portuguese retirement benefits and German personal assistance benefits.

In December 2001 Mr Da Silva Martins returned to Portugal. Initially his return was intended

to be temporary, but as from 31 July 2002 it became permanent and he deregistered as an inhabitant of Germany. When the relevant German insurance institution, the 'BBKK', found this out in February 2003, it stopped paying Mr Da Silva Martins' personal assistance benefits and demanded repayment of the benefits paid in the period August-December 2002. This decision was based on provisions in the Personal Assistance Insurance Act to the effect that a retiree who ceases to be an inhabitant of Germany ceases to be compulsorily insured and therefore loses his entitlement to the benefits under the Act unless he continues to be insured on a voluntary basis. Applications for voluntary insurance must be submitted within three months following the cessation of the compulsory insurance. In addition, the entitlement to personal assistance benefits is suspended during temporary residence abroad.

National proceedings

Mr Da Silva Martins applied to the social insurance court (Sozialgericht) in Frankfurt. It struck down the BBKK's decision, holding that Mr Da Silva Martins had continued to be insured beyond 31 July 2002 on a voluntary basis. However, on appeal this judgment was largely overturned. Mr Da Silva Martins appealed to the Federal Social Insurance Court (Bundessozialgericht), arguing that it must be possible to export care insurance benefits to another EU country, in particular where the cover was financed by his own contributions and no comparable benefits exist in Portugal. The court referred questions to the ECJ. The questions relate to Articles 39 and 42 EC on free movement and to Articles 27 and 28 of the Regulation and whether they override Article 15(2), which provides that, where application of the law of two or more Member States entails overlapping of insurance under a compulsory insurance scheme and one or more voluntary or optional continued insurance schemes, the person concerned shall be subject exclusively to the compulsory insurance scheme.

ECJ's findings

1. A benefit may be regarded as a social security benefit within the meaning of Regulation 1408/71 insofar as it relates to one of the risks expressly listed in Article 4(1). The 'risk of reliance on care', that has only recently been covered by the social security schemes of several Member States, does not appear expressly on that list. However, in Molenaar (C-160/96), the ECJ held that benefits such as those provided under the German care insurance scheme must be regarded as 'sickness benefits' within the meaning of Article 4(1) (§ 38-46).

2. However, the ECJ has always acknowledged that care insurance benefits, although they are 'sickness benefits' within the meaning of Article 4(1), are at most supplementary to, not necessarily an integral part of and in some respects different from, the 'classic' sickness benefits. They display certain characteristics of invalidity benefits and of old-age benefits (§

47-48).

3. The referring court's question must be answered in the light of the above (§ 49).

4. Were it not for Article 15(2) of the Regulation, Mr da Silva Martins would be allowed to retain (voluntary) insurance beyond 1 August 2002, even though his relocation to Portugal caused his compulsory insurance with the German sickness insurance scheme to cease and caused him to be covered by the Portuguese compulsory sickness insurance scheme. Article 15(2) provides that, where application of the legislation of two or more Member States entails overlapping of insurance under a compulsory insurance scheme [Editor: in this case, that of Portugal] and one or more voluntary of optional continued insurance schemes [in this case, that of Germany], the person concerned shall be subject exclusively to the compulsory insurance scheme (in this case, that of Portugal). Article 15(2) is one of the expressions of the principle of a single social security scheme, as set out in particular in Article 13(1) (§ 50-54).

5. Article 15(2) does not apply, because Article 15(1) provides that the provisions embodying the single scheme principle (Article 13-14 d) shall not apply to voluntary or to optional continued insurance unless, in respect to the relevant type of insurance [in this case, sickness], there exists in any Member State only a voluntary scheme of insurance. The exception does not apply, since German care insurance is generally a compulsory insurance scheme. Moreover, Article 15(2) is not intended to apply to a situation such as that at issue, in which the contributions for the optional German Care insurance scheme and those for the compulsory Portuguese sickness insurance scheme, although equated with each other for the purposes of Regulation 1408/71, are not identical. Therefore, the Regulation does not, in principle, stand in the way of Mr da Silva Martins continuing his German care insurance following his return to Portugal (§ 55-59).

6. The ECJ proceeds to address Articles 27 and 28 of the Regulation. Article 27 provides, 'A pensioner who is entitled to draw pensions under the legislation of two or more Member States, one of which is that of the Member State in which he resides, and who is entitled to benefits under the legislation of the latter Member State [...] shall [...] receive such benefits from the institution of the place of residence and at the expense of that institution as though the person concerned were a pensioner whose pension was payable solely under the legislation of the latter Member State'. Applied to the present case, this means that Mr da Silva Martins, being entitled to Portuguese benefits, was to receive those benefits as though he had lived and worked in Portugal all his life. Article 28 deals with the situation that a pensioner is not entitled to relevant benefits under the legislation of his country of residence. In that case he retains his entitlement to the benefits of another Member State under certain conditions (§ 60-16).

7. Article 28 does not apply, given that care benefits qualify as sickness benefits within the meaning of the Regulation. It therefore needs to be examined whether Mr da Silva Martins can claim under Article 27 (§ 65).

8. Given that care benefits qualify as sickness benefits, and that Mr da Silva Martins is insured under the Portuguese sickness insurance scheme, it is in principle for Portugal to provide him with benefits relating to the risk of reliance on care (§ 66-68).

9. However, Article 27 must be interpreted in the light of the objectives underlying the Regulation, taking into account the particular features of benefits relating to the risk of reliance on care as opposed to sickness benefits in the narrow sense (§ 69).

10. Regulation 1408/71 aims to contribute to the establishment of the greatest possible freedom of movement for migrant workers. However, the Regulation merely provides for coordination, not harmonisation of legislation. Differences in legislation therefore remain. The Regulation cannot guarantee to an insured person that moving to another Member State will be neutral in terms of social security, in particular where sickness benefits are concerned. Therefore, a relocation leading to a less favourable situation may in principle be compatible with the requirements of primary EU law on the freedom of movement for persons (§ 70-72).

11. 'However, according to settled case law, such compatibility would exist only to the extent that, in particular, the national legislation concerned does not place the worker at a disadvantage compared to those who pursue all their activities in the Member State where it applies and does not purely and simply result in the payment of social security contributions on which there is no return' (§ 73).

12. In a situation such as that of Mr da Silva Martins, the automatic suspension of the provision of all benefits linked to the German care insurance scheme in the event of his relocation to Portugal is such as to entail contributions on which there is no return. Therefore it would be inconsistent with the aim pursued by Article 48 TFEU if a former migrant worker in a position such as Mr da Silva Martins were to lose all advantages representing the counterpart of contributions paid by him in Germany in respect of a separate insurance scheme relating not to the risk of sickness in the narrow sense but to the risk of reliance on care, simply because Article 27 entitles him to Portuguese sickness benefits in the narrow sense (§ 74-78).

13. Thus, the mere fact that Mr Da Silva Martins became entitled to Portuguese sickness benefits upon his return to Portugal does not lead to his losing entitlement to the German care insurance scheme. Should it be established that the Portuguese sickness insurance scheme does provide for cash benefits relating to the risk of reliance on care, albeit at a lower level,

then the principles underlying Regulation 1408/71 require that he be paid the balance at the expense of the German competent institution (§ 83).

Ruling

Articles 15 and 27 of Council Regulation (EEC) No 1408/71 [...] must be interpreted as not precluding a person in a situation such as that at issue in the main proceedings, who draws retirement pensions from retirement insurance funds both of his Member State of origin and of the Member State in which he spent most of his working life and has moved from that Member State to his Member State of origin, from continuing, by reason of optional continued affiliation to a separate care insurance scheme in the Member State in which he spent most of his working life, to receive a cash benefit corresponding to that affiliation, in particular where cash benefits relating to the specific risk of reliance on care do not exist in the Member State of residence, that being a matter for the referring court to ascertain.

If, contrary to that hypothesis, cash benefits relating to the risk of reliance on care are provided for under the legislation of the Member State of residence, but only at a lower level than that of the benefits relating to that risk from the other pension-paying Member State, Article 27 of Regulation No 1408/71 [...] must be interpreted as meaning that such a person is entitled, at the expense of the competent institution of the latter State, to additional benefits equal to the difference between the two amounts.

Creator: European Court of Justice (ECJ)
Verdict at: 2011-06-30
Case number: C-388/09