

**Judgment of the court 25 February 2003**

**Idryma Koinonikon Asfaliseon (IKA) v Vasilios Ioannidis**

**Social security - Hospital treatment of a pensioner during a stay in a Member State other than the State in which he resides - Conditions for funding - Articles 31 and 96 of Regulation (EEC) No 1408/71 - Articles 31 and 93 of Regulation (EEC) No 574/72**

**Case C-326/00**

*European Court reports 2003 Page I-01703*

In Case C-326/00,

REFERENCE to the Court under Article 234 EC by the Diikitiko Protodikio Thessalonikis (Greece) for a preliminary ruling in the proceedings pending before that court between

Idryma Koinonikon Asfaliseon (IKA)

and

Vasilios Ioannidis

on the interpretation of Articles 31 and 36 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10), of Articles 31 and 93 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95, of Articles 56 and 59 of the EC Treaty (now, after amendment, Articles 46 EC and 49 EC) and 60 of the EC Treaty (now Article 50 EC), and of Article 1 of the Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms,

THE COURT,

composed of: G.C. Rodríguez Iglesias, President, M. Wathelet, R. Schintgen and C.W.A. Timmermans (Presidents of Chambers), C. Gulmann, D.A.O. Edward, A. La Pergola (Rapporteur), P. Jann, V. Skouris, F. Macken, N. Colneric, S. von Bahr and J.N. Cunha Rodrigues, Judges,

Advocate General: D. Ruiz-Jarabo Colomer,

Registrar: H.A. Rühl, Principal Administrator,

after considering the written observations submitted on behalf of:

- Idryma Koinonikon Asfaliseon (IKA), by D.G. Anastassopoulos, acting as Agent,
- the Greek Government, by S. Spyropoulos, I. Bakopoulos and I. Galani-Marangoudaki, acting as Agents,
- the Belgian Government, by A. Snoecx, acting as Agent,
- the Spanish Government, by N. Díaz Abad, acting as Agent,
- the Irish Government, by D.J. O'Hagan, acting as Agent, assisted by A.M. Collins BL,
- the Austrian Government, by H. Dossi, acting as Agent,

- the United Kingdom Government, by R. Magrill, acting as Agent, and S. Moore, Barrister,
- the Commission of the European Communities, by H. Michard and M. Panayotopoulos, acting as Agents,

having regard to the Report for the Hearing,

after hearing the oral observations of Idryma Koinonikon Asfaliseon (IKA), represented by D.G. Anastassopoulos; the Greek Government, represented by S. Spyropoulos and I. Bakopoulos; the Spanish Government, represented by N. Diaz Abad; the Irish Government, represented by A.M. Collins; the Netherlands Government, represented by H.G. Sevenster, acting as Agent; the Finnish Government, represented by T. Pynnä, acting as Agent; the United Kingdom Government, represented by D. Lloyd-Jones QC; and the Commission, represented by H. Michard and M. Patakia, acting as Agents, at the hearing on 10 September 2002,

after hearing the Opinion of the Advocate General at the sitting on 15 October 2002,

gives the following

### **Judgment**

1. By order of 31 January 2000, received at the Court on 4 September 2000, the Diikitiko Protodikio Thessalonikis (Administrative Court of First Instance, Thessaloniki) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Articles 31 and 36 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6), as amended by Council Regulation (EC) No 3096/95 of 22 December 1995 (OJ 1995 L 335, p. 10) ('Regulation No 1408/71'), of Articles 31 and 93 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95 ('Regulation No 574/72'), of Articles 56 and 59 of the EC Treaty (now, after amendment, Articles 46 EC and 49 EC) and 60 of the EC Treaty (now Article 50 EC), and of Article 1 of the Protocol to the European Convention on the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950.

2. Those questions were raised in proceedings between Mr Ioannidis and Idryma Koinonikon Asfaliseon (Greek Social Insurance Institute, 'the IKA') concerning the IKA's refusal to fund hospital treatment for Mr Ioannidis during a stay in Germany.

### **Legal background**

#### **Community law**

3. Contained in Section 5 ('Pensioners and members of their families') of Chapter 1 of Title III of Regulation No 1408/71, Article 31 of that regulation, headed 'Stay of the pensioner and/or members of his family in a State other than the State in which they reside', provides:

'A pensioner entitled to a pension or pensions under the legislation of one Member State or to pensions under the legislation of two or more Member States who is entitled to benefits under the legislation of one of those States shall, with members of his family who are staying in the territory of a Member State other than the one in which they reside, receive:

(a) benefits in kind provided by the institution of the place of stay in accordance with the provisions of the legislation which it administers, the cost being borne by the institution of the pensioner's place of residence;

...'

4. Article 22(1) of that regulation, which forms part of Section 2 ('Employed or self-employed persons and members of their families') of that chapter, provides:

'An employed or self-employed person who satisfies the conditions of the legislation of the competent State for entitlement to benefits ... and:

(a) whose condition necessitates immediate benefits during a stay in the territory of another Member State;

or

(b) ...

or

(c) who is authorised by the competent institution to go to the territory of another Member State to receive there the treatment appropriate to his condition,

shall be entitled:

(i) to benefits in kind provided on behalf of the competent institution by the institution of the place of stay or residence in accordance with the provisions of the legislation which it administers, as though he were insured with it; the length of the period during which benefits are provided shall be governed, however, by the legislation of the competent State;

...':

**5.** Article 22a, headed 'Special rules for certain categories of persons', of Regulation No 1408/71 provides:

'Notwithstanding Article 2 of the Regulation, Article 22(1)(a) and (c) shall also apply to persons who are nationals of a Member State and are insured under the legislation of a Member State and to the members of their families residing with them.'

**6.** Article 31(1) and (2) of Regulation No 574/72 provides:

'1. In order to receive benefits in kind under Article 31 of the Regulation, a pensioner shall submit to the institution of the place of stay a certified statement testifying that he is entitled to the said benefits. This certified statement, which shall be issued by the institution of the pensioner's place of residence, if possible before he leaves the territory of the Member State where he resides, shall indicate in particular, where appropriate, the maximum period during which benefits in kind may be granted, in accordance with the legislation of that Member State. If the pensioner does not submit the said certified statement, the institution of the place of stay shall obtain it from the institution of the place of residence.

2. The provisions of Article 17(6), (7) and (9) of the implementing Regulation shall apply by analogy. In such a case, the institution of the pensioner's place of residence shall be considered to be the competent institution.'

**7.** Under Article 17(6), (7) and (9) of Regulation No 574/72:

'6. In the event of hospitalisation, the institution of the place of residence shall, within three days of becoming aware of the fact, notify the competent institution of the date of entry into hospital, the probable duration of hospitalisation and the date of leaving hospital. Notification shall be unnecessary, however, when the costs of the benefits in kind are repaid in a lump sum to the institution of the place of residence.

7. The institution of the place of residence shall notify the competent institution in advance of any decision relating to the granting of benefits in kind where the likely or actual cost exceeds a lump sum which is fixed and periodically reviewed by the Administrative Commission. The competent institution shall have 15 days from the day on which such information is sent within which to raise any objection and to state the reasons on which such objection is based; if, at the end of that period, no such objection has been raised, the institution of the place of residence shall grant the benefits in kind. Where such benefits have to be granted in a case of extreme urgency, the institution of the place of residence shall forthwith inform the competent institution thereof. However, notification of its objection, stating the reasons on which such objection is based, shall be unnecessary when the costs of the benefits in kind are repaid in a lump sum to the institution of the place of residence.

...

9. Two or more Member States or the competent authorities of those Member States may, having received the opinion of the Administrative Commission, agree on other implementing provisions.'

**8.** As may be seen from Decision 94/604/EC No 153 of the Administrative Commission of the European Communities on social security for migrant workers of 7 October 1993 on the model forms necessary for the application of Regulations No 1408/71 and No 574/72 (E 001, E 103 to E 127) (OJ 1994 L 244, p. 22), Form E 111 constitutes the certified statement referred to in Article 31(1) of Regulation No 574/72. According to that decision, that form must also be used in the case referred to in Article 22(1)(a)(i) of Regulation No 1408/71, while Form E 112 is required in the case referred to in Article 22(1)(c)(i) of that regulation.

9. Section 7, headed 'Reimbursement between institutions', of Chapter 1 of Title III of Regulation No 1408/71 consists of Article 36, which reads as follows:

'1. Benefits in kind provided in accordance with the provisions of this chapter by the institution of one Member State on behalf of the institution of another Member State shall be fully refunded.

2. The refunds referred to in paragraph 1 shall be determined and made in accordance with the procedure provided for by the implementing Regulation referred to in Article 98, either on production of proof of actual expenditure or on the basis of lump-sum payments.

In the latter case, the lump-sum payments shall be such as to ensure that the refund is as close as possible to actual expenditure.

3. Two or more Member States, or the competent authorities of those States, may provide for other methods of reimbursement or may waive all reimbursement between institutions under their jurisdiction.'

10. Under Article 93 of Regulation No 574/72:

'1. The actual amount of ... benefits in kind provided under Article ... 31 of [Regulation No 1408/71] shall be refunded by the competent institution to the institution which provided the said benefits as shown in the accounts of that institution.

2. In the cases referred to in ... Articles ... 31 of [Regulation No 1408/71], and for the purposes of implementing paragraph 1, the institution of the place of residence of the members of the family or of the pensioner, as the case may be, shall be considered as the competent institution.

3. If the actual amount of the benefits referred to in paragraph 1 is not shown in the accounts of the institution which has provided them, and no agreement has been concluded under paragraph 6, the amount to be refunded shall be determined on the basis of a lump-sum payment calculated from all the appropriate references obtained from the data available. The Administrative Commission shall assess the bases to be used for the calculation of the lump-sum payments and shall decide the amount thereof.

...

6. Two or more Member States or the competent authorities of those Member States may, having received the opinion of the Administrative Commission, agree to other methods of assessing the amounts to be refunded, in particular on the basis of lump sums.'

11. Article 34 of Regulation No 574/72 provides:

'1. If it is not possible during an employed or self-employed person's stay in a Member State other than the competent State to complete the formalities provided for in Articles ... 31 of the implementing Regulation, his expenses shall, upon his application, be refunded by the competent institution in accordance with the refund rates administered by the institution of the place of stay.

2. The institution of the place of stay shall, at the request of the competent institution, supply it with the necessary information about such rates.

If the institution of the place of stay and the competent institution are bound by an agreement providing either that no refund, or that a lump-sum refund of benefits provided, in pursuance of Articles ... 31 of the Regulation, be made, the institution of the place of stay shall, in addition, be required to transfer to the competent institution the amount to be refunded to the person concerned in pursuance of the provisions of paragraph 1.

3. Where major expenses are involved, the competent institution may pay an appropriate advance to the person concerned as soon as that person submits to the said institution the claim for refund.

4. Notwithstanding paragraphs 1, 2 and 3, the competent institution may effect the reimbursement of expenses incurred in accordance with the rates it administers provided that it is possible to make a refund in accordance with these rates, that the expenses to be refunded do not exceed a level determined by the Administrative Commission and that the employed person or self-employed person or pensioner agrees to the application of this provision. In any case, the amount of reimbursement shall not exceed the amount of the expenses actually incurred.

5. If the legislation of the State of residence does not provide for rates of reimbursement, the competent institution may effect the reimbursement under the conditions laid down in paragraph 4 without the agreement of the person concerned being necessary.'

### **National law**

12. Decree No 33651/E. 1089 of the Minister of Labour of 2 June 1956 laying down the IKA Hospital Care Regulations (FEK B' 126/3.7.1956), as subsequently amended on several occasions ('the IKA Regulations'), includes an Article 3a, in which it is provided *inter alia* that, if it is not possible for the illness to be diagnosed or for the person insured with the IKA to be treated in hospital in Greece, because of a lack either of doctors with the required specialisation or of suitable scientific means, the IKA is to bear the whole cost of diagnosis and treatment incurred by the insured person abroad. Bearing the cost of hospital treatment thus received abroad is subject to a prior authorisation system, which allows the IKA to ascertain that the above conditions are satisfied.

13. As an exception, Article 3a(4)(g) of the IKA Regulations provides, however:

'In very exceptional cases, the director of the competent regional branch may, after the competent medical committee has given its opinion, authorise hospital treatment which has already taken place abroad, provided that prior authorisation was not feasible, either because the illness manifested itself suddenly during a temporary stay of the insured person abroad or because he had to be transferred there urgently in order to avert a real risk to his life. In those cases the medical committee of appeal shall give its opinion on the basis of the information which exists both on any hospital or other treatment in Greece and on the hospital or other treatment which took place abroad.'

### **The main proceedings and the questions referred for a preliminary ruling**

14. Mr Ioannidis resides in Greece and receives an old-age pension from the IKA there. During a stay in Germany he was admitted to the clinic of the Technical University of Munich from 26 November to 2 December 1996, and *inter alia* underwent catheterisation with a heart catheter. It appears from the medical certificates issued on that occasion that he was admitted to hospital as a matter of urgency because of recurring pains in the thorax connected with angina pectoris.

15. On 6 December 1996 Mr Ioannidis requested the sickness fund of the undertaking Karstadt, established in Essen (Germany) ('the German sickness fund'), as the institution of the place of stay, to pay on behalf of the IKA the costs of his hospital treatment.

16. The German sickness fund thereupon sent the IKA a Form E 107 with a view to obtaining from the latter, as the competent institution, the issue of a Form E 112 or, failing that, confirmation that it was not possible to issue such a form.

17. Although it was aware that a Form E 111 valid for the period from 16 November to 31 December 1996 had been issued to Mr Ioannidis by the competent local branch of the IKA on 15 November 1996, the IKA sought the opinion of the medical committee of appeal ('the MCA') on whether it was appropriate to authorise *ex post facto* his hospital treatment.

18. The MCA gave an unfavourable opinion, on the grounds that the illness from which Mr Ioannidis suffered had not manifested itself sufficiently suddenly during his stay in Germany to justify an immediate admission to hospital and that it could have been properly treated in Greece. The MCA observed, more particularly, that Mr Ioannidis's illness was chronic, as was shown by various examinations in June 1996, that the deterioration in his state of health had not been sudden, since the coronary angiography he had had in Greece on 11 November 1996 had shown the same results as that performed when he was in hospital in Germany, and, finally, that that stay in hospital had been planned in advance.

19. Since it considered that the conditions laid down in Article 3a(4)(g) of the IKA Regulations were not therefore satisfied, the IKA decided on 18 April 1997 not to authorise *ex post facto* the treatment given to Mr Ioannidis. It sent the Form E 107 back to the German sickness fund, stating that it was unable to issue a Form E 112 in the case.

20. Mr Ioannidis complained against the refusal of authorisation to the competent administrative committee of the IKA. He pointed out *inter alia* that the purpose of his stay in Germany was to visit his son, who lives with his mother there.

21. Since it considered that Mr Ioannidis's illness had indeed appeared suddenly during that stay and that his admission to hospital had been necessary to avert a real risk to his life, the committee decided on 14 July 1997 that the disputed treatment should be authorised *ex post facto*, pursuant to Article 3a(4)(g) of the IKA Regulations, and that the IKA should therefore reimburse the cost.

22. The IKA brought an action in the Diikitiko Protodikio Thessalonikis for annulment of that decision, arguing that the conditions laid down by that provision were not satisfied in this case.

23. It was in those circumstances that the Diikitiko Protodikio Thessalonikis decided to stay the proceedings and refer the following questions to the Court for a preliminary ruling:

'(1) Is Article 3a(4)(g) of the Hospital Care Regulations of the IKA, in the version in force at the time of the defendant's hospital treatment, to the extent that it lays down as an additional requirement, before the IKA may in very exceptional cases - namely in cases where a particular illness of the pensioner of the IKA seeking their refund manifested itself suddenly while he was temporarily staying abroad or where he was transferred there urgently in order to avert a real risk to his life - refund the costs of treatment which has already taken place in hospital abroad, that the director of the competent regional branch of the IKA must grant the related authorisation after an opinion has been given by the IKA's Medical Committee of Appeal, consistent with the provisions ... of Articles 31 and 36 of Regulation (EEC) No 1408/71 of the Council and Articles 31 and 93 of Regulation (EEC) No 574/72 of the Council since, even if it were accepted that those provisions in principle confer on the Member States discretion - in respect of benefits, including sickness benefits in kind, for pensioners temporarily staying in the territory of a Member State other than the one in which they reside, which benefits must be considered also to comprise the provision of hospital treatment - to enact provisions establishing as an additional condition for the refund of the costs relating to the benefits the, albeit *ex post facto*, authorisation of those costs, it is in any event not entirely clear and free from doubt whether they additionally allow the Member States to enact provisions establishing as a necessary condition for the grant of such authorisation that requirements be met similar to those laid down in the aforementioned provision of the IKA Regulations at issue, that is to say requirements which are related to the immediate need for provision of hospital treatment?

(2) On the basis that services comprising the provision of care within hospitals constitute services within the meaning of Article 60 of the EC Treaty, is the aforementioned provision of the IKA Regulations, even if it were considered, to the extent referred to above, not to be contrary to the above provisions of the Council Regulations, consistent to that extent with Articles 59 and 60 of the EC Treaty?

(3) If Question 2 is answered in the negative, is the rule laid down by that provision of the IKA Regulations justified on grounds of public health which are related to the provision of a balanced hospital service accessible to everybody resident within Greece and does it therefore fall within the exceptions in Article 56 of the EC Treaty?

(4) On the basis that the entitlement to sickness benefits in kind and, by extension, the claim for refund of the costs relating to them constitute possessions within the meaning of Article 1 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Paris on 20 March 1952, is the aforementioned provision of the IKA Regulations - even if it were considered that to the extent referred to above it is not contrary to the aforementioned provisions of the Council Regulations and of the EC Treaty, or, that is to say on the contrary basis, that it is justified in accordance with the matters previously set out - consistent to that extent with the first paragraph of Article 1 of the Protocol?

(5) If Question 4 is answered in the negative, is the rule laid down by the aforementioned provision of the IKA Regulations justified on grounds of public interest which are connected with preservation of the financial stability of the social security system and does it therefore fall within the exceptions in the second paragraph of Article 1 of that Protocol?'

#### Question 1

24. By its first question, the national court is asking, essentially, whether Articles 31 and 36 of Regulation No 1408/71 and Articles 31 and 93 of Regulation No 574/72 preclude national legislation under which reimbursement by the institution of a pensioner's place of residence of hospital treatment received by him during a stay in another Member State is subject to *ex post facto* authorisation which is granted only in so far as the prior authorisation normally required by that national legislation was impossible to obtain because the illness in question manifested itself suddenly during that stay, making the provision of treatment immediately necessary.

#### The relevance of the question

25. The IKA and several of the Governments which submitted written observations to the Court expressed doubts as to the applicability of Article 31 of Regulation No 1408/71 in factual circumstances such as those in the case in the main proceedings. The IKA and the Greek Government suggested, in particular, that Mr Ioannidis had gone to Germany with the intention of receiving the treatment he was given there, so that the facts should, in their view, be examined in the light of Article 22(1)(c) of Regulation No 1408/71 rather than Article 31.

26. On that point, the Court has indeed held that Article 22(1)(c) of Regulation No 1408/71 governs the entitlement to benefits in kind of pensioners, resident in a Member State, who ask the competent institution for authorisation to go to the territory of another Member State to receive treatment there which is appropriate to their condition, while Article



31 of that regulation governs the entitlement of that class of insured persons to benefits in kind where those benefits become necessary during a stay in a Member State other than the State in which they reside (see Case 182/78 *Pierik* [1979] ECR 1977, paragraphs 6 and 8).

**27.** However, it should be remembered that, in proceedings under Article 234 EC, which is based on a clear separation of functions between the national courts and the Court of Justice, any assessment of the facts in the case is a matter for the national court (see *inter alia* Case 36/79 *Denkavit Futtermittel* [1979] ECR 3439, paragraph 12, and Case C-235/95 *Dumon and Froment* [1998] ECR I-4531, paragraph 25). Similarly, it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court. Consequently, where the questions submitted by the national court concern the interpretation of Community law, the Court of Justice is, in principle, bound to give a ruling (see *inter alia* Case C-415/93 *Bosman* [1995] ECR I-4921, paragraph 59).

**28.** It follows that it is for the national court alone to establish whether in fact the treatment received by Mr Ioannidis in Germany was planned by him and whether his stay was planned for medical purposes, in which case Article 22(1)(c) and (2) of Regulation No 1408/71 would be solely applicable, as pointed out in paragraph 26 above, to the exclusion of Article 31 of that regulation.

**29.** In the present case, however, it does not appear that the national court considered that the hospital treatment at issue in the main proceedings had been planned in advance by Mr Ioannidis and his stay in Germany planned for medical purposes. On the contrary, the court specifically refers in its account of the facts to the existence of medical certificates stating that Mr Ioannidis was admitted to hospital as a matter of urgency because of recurring pains in the thorax as a result of angina pectoris. In those circumstances, the admissibility of the first question, in so far as it relates to the interpretation of Article 31 of Regulation No 1408/71, cannot be doubted, and there is no need to reformulate it so that it refers to Article 22(1)(c) of Regulation No 1408/71.

#### **The scope of Article 31 of Regulation No 1408/71**

**30.** In order to answer the national court's question, the scope of Article 31 of Regulation No 1408/71 must first be defined.

**31.** It should be noted, first, that unlike Article 22(1)(a) of Regulation No 1408/71, which confers an entitlement to benefits in kind on employed or self-employed persons 'whose condition necessitates immediate benefits during a stay in the territory of another Member State', Article 31 of that regulation, which lays down a similar entitlement for pensioners and members of their families who are staying in a Member State other than the one in which they reside, has no corresponding provision as to the state of health of the persons concerned.

**32.** Second, while the Court has indeed held that, even if they do not pursue a professional or trade activity, pensioners fall within the provisions of Regulation No 1408/71 on 'workers' by virtue of being affiliated to a social security scheme, it stated that that is the case only if they are not the subject of special provisions laid down regarding them (*Pierik*, paragraph 4).

**33.** Having observed in that respect that Regulation No 1408/71 lays down, in Articles 27 to 33, special provisions exclusively applicable to pensioners, the Court stated that those provisions govern, in Article 31, the entitlement of those insured persons to benefits in kind where those benefits become necessary during a stay in a Member State other than the State in which they reside (*Pierik*, paragraphs 5 and 6).

**34.** In those circumstances, contrary to the suggestions of the Governments of a number of Member States, it cannot be argued either that pensioners staying in a Member State other than their State of residence fall within Article 22(1)(a) of Regulation No 1408/71 or that the provisions of that article should inspire the interpretation of Article 31 of that regulation.

**35.** As the Belgian and Finnish Governments and the Commission have pointed out, an interpretation harmonising the systems established by the above two provisions would disregard both the differences of wording referred to in paragraph 31 above and the fact that the Community legislature thought fit to enact a specific provision for the category of insured persons consisting of pensioners and members of their families.

**36.** For the same reasons, contrary to the submissions of the Irish and Netherlands Governments, it cannot be considered that Article 22a of Regulation No 1408/71 has the effect of subjecting pensioners to the system laid down by Article 22(1)(a) of that regulation. Moreover, such an interpretation has no basis either in the wording of Article 22a, which, as its heading states, lays down '[s]pecial rules for certain categories of persons', or, as the Finnish Government observes, in the preamble to Council Regulation (EC) No 3095/95 of 22 December 1995 amending Regulation No 1408/71, Regulation No 574/72, Regulation (EEC) No 1247/92 amending Regulation (EEC) No 1408/71 and Regulation (EEC) No 1945/93 amending Regulation (EEC) No 1247/92 (OJ 1995 L 335, p. 1), which inserted Article 22a into Regulation No 1408/71.

37. The argument of the Irish and Netherlands Governments that only the application by analogy of Article 22(1)(a) of Regulation No 1408/71 is capable of guaranteeing the necessary equality of insured persons cannot be accepted either.

38. As both the Greek Government, in its written observations, and the Advocate General, at point 32 of his Opinion, have observed, the fact that the Community legislature did not wish to model the system applicable to non-working pensioners on that applicable to employed and self-employed persons may be explained by a desire to promote effective mobility of that category of insured persons, taking into account certain characteristics which typify them, such as a potentially greater vulnerability and dependence in health terms and an increased freedom from commitments permitting more frequent stays in other Member States.

39. It follows that the system established by Article 31 of Regulation No 1408/71 must be distinguished from that laid down by Article 22(1)(a) of that regulation.

40. In particular, Article 31 of Regulation No 1408/71 cannot be interpreted as meaning that the enjoyment of the benefits in kind it guarantees is reserved solely to pensioners whose condition requires immediate benefits during a stay in another Member State, that is to say, it cannot be limited solely to treatment which is found to be medically necessary immediately (Case C-206/94 *Paletta* [1996] ECR I-2357, paragraph 20) and thus could not be deferred until the insured person returns to his State of residence.

41. Nor can that provision be interpreted as meaning that those benefits are limited solely to cases where the treatment provided has become necessary because of a sudden illness. In particular, the circumstance that the treatment necessitated by developments in the insured person's state of health during his temporary stay in another Member State may be linked to a pre-existent pathology of which he is aware, such as a chronic illness, cannot suffice to prevent him from enjoying the benefit of the provisions of Article 31 of Regulation No 1408/71.

42. Moreover, it should be noted that, unlike for example Article 22(1)(c) of Regulation No 1408/71, Article 31 of that regulation does not provide for a system of authorisation with respect to the provision of the benefits in kind which it guarantees to pensioners and members of their families staying in a Member State other than the State in which they reside.

43. It follows from all the foregoing that it is not permissible for a Member State to make provision of the benefits in kind guaranteed by Article 31 of Regulation No 1408/71 to pensioners staying in a Member State other than the State in which they reside subject either to any authorisation procedure whatever or to the requirement that the illness which necessitated the treatment in question manifested itself suddenly during that stay, making that treatment immediately necessary.

#### **The implementation in practice of Article 31 of Regulation No 1408/71**

44. As is apparent from the wording of its first question, the national court is uncertain, next, as to the scope of Article 31 of Regulation No 574/72, a provision relating to the application of Article 31 of Regulation No 1408/71.

45. Having regard to the circumstances in the case in the main proceedings, it should be observed that that provision provides *inter alia* that, in order to receive benefits in kind under Article 31 of Regulation No 1408/71, a pensioner must submit to the institution of the place of stay a certified statement issued by the institution of the place of residence testifying that he is entitled to those benefits. The provision states, however, that if the person concerned does not submit the certified statement, the institution of the place of stay must itself obtain it from the institution of the place of residence.

46. In the present case, it appears from the order for reference that such a certificate, namely a Form E 111, had been issued to Mr Ioannidis before his departure for Germany.

47. On the other hand, as the Irish Government observes, the order for reference does not specify whether the form was submitted to the German sickness fund. However, the possible omission to submit the form spontaneously cannot have decisive consequences. In such a case it is for the institution of the place of stay to ascertain that the person concerned does not have such a form, and, if he does not, to ask the competent institution to issue it, as provided for in Article 31 of Regulation No 574/72.

48. In the main proceedings, however, the German sickness fund asked the IKA to send a Form E 112, that is, the certificate used in the case of a request for authorisation to go to the territory of another Member State to receive treatment there, in accordance with Article 22(1)(c) of Regulation No 1408/71.

49. That must be regarded as equivalent to a refusal to apply Article 31 of Regulation No 1408/71, whether or not the Form E 111 was produced spontaneously by the person concerned. If the institution of the place of stay requires a Form E 112 to be produced instead of being satisfied with the Form E 111 produced by the insured person or applying



to the institution of the place of residence for the latter form, that necessarily implies that the institution of the place of stay considers that the benefits in kind do not have to be provided to the insured person on the basis of Article 31 of Regulation No 1408/71.

**50.** For the purposes of providing an answer to the national court's question, it must be stated that, in the face of such a refusal and such a requirement on the part of the institution of the place of stay, the competent institution of the place of residence which has previously issued the insured person with a Form E 111 is not entitled merely to assume, as the IKA appears to have done in the case in the main proceedings, that the necessary conditions for the application of Article 31 of Regulation No 1408/71 are not satisfied.

**51.** The institutions of the place of stay and the place of residence jointly assume the task of applying Articles 31 and 36 of Regulation No 1408/71 and Articles 31 and 93 of Regulation No 574/72, and must, in accordance with Article 10 EC and Article 84 of Regulation No 1408/71, cooperate in order to ensure that those provisions are applied correctly and, consequently, that the rights conferred on pensioners and members of their families by Article 31 of Regulation No 1408/71 with a view to facilitating the freedom of movement of those insured persons are fully respected (see, to similar effect, Case C-335/95 *Picard* [1996] ECR I-5625, paragraph 18, and Case C-202/97 *FTS* [2000] ECR I-883, paragraphs 51 and 56).

**52.** It follows, in particular, that where the institution of the place of residence receives from the institution of the place of stay a request to issue a Form E 112 even though it has previously issued its insured person with a Form E 111, it must ascertain, if necessary by asking the institution of the place of stay for all material information, whether the apparent refusal to provide the benefits in kind under Article 31 of Regulation No 1408/71 is well founded. If the institution of the place of residence is persuaded that Article 31, and consequently Article 36 of Regulation No 1408/71 and Article 93 of Regulation No 574/72 on reimbursement between institutions, should indeed be applied, it must inform the institution of the place of stay of this. The latter is then obliged to reconsider whether its position is well founded, and if necessary to alter it.

#### **Funding of the treatment covered by Article 31 of Regulation No 1408/71**

**53.** Having regard to the subject-matter of the main proceedings, which concern a possible obligation to reimburse the costs of the hospital treatment of the person in question in a Member State other than his State of residence, the national court is uncertain, finally, as is apparent from its first question, as to the scope of Article 36 of Regulation No 1408/71 and Article 93 of Regulation No 574/72.

**54.** It must be remembered that, under Article 36 of Regulation No 1408/71, benefits in kind provided by the institution of one Member State on behalf of the institution of another Member State are to be fully refunded, in accordance with the procedure provided for by Regulation No 574/72, either on production of proof of actual expenditure or on the basis of lump-sum payments, unless the Member States concerned, or the competent authorities of those States, have provided for other methods of reimbursement or waived all reimbursement between institutions under their jurisdiction.

**55.** To implement the above provision, Article 93 of Regulation No 574/72 provides *inter alia* that the benefits in kind provided by the institution of the place of stay under Article 31 of Regulation No 1408/71 are to be refunded to it by the institution of the place of residence of the persons concerned, and that the amount of the refund is in principle the actual amount of those benefits as shown in the accounts of the institution of the place of stay. If that amount is not shown in those accounts, and the Member States concerned or their competent authorities have not agreed on other methods of assessment, the reimbursement takes place on the basis of a lump sum whose amount is decided by the Administrative Commission of the European Communities on social security of migrant workers.

**56.** Those are the provisions which are normally applicable when a pensioner has received benefits in kind on the basis of Article 31 of Regulation No 1408/71.

**57.** In the case in the main proceedings, however, as noted in paragraphs 48 and 49 above, the German sickness fund refused to provide Mr Ioannidis with such benefits in kind, so that it may be inferred, even though this does not follow expressly from the order for reference, that Mr Ioannidis probably bore personally the cost of the treatment provided, reimbursement of which has so far been refused to him by the IKA.

**58.** Article 34 of Regulation No 574/72 admittedly states that, if it has not been possible to comply with the formalities provided for in Article 31 of that regulation during the stay in the territory of the Member State where the treatment has been provided, the person concerned is entitled to request the institution of his place of residence to refund the costs incurred, within the limits fixed by that provision.

**59.** Nevertheless, it must be accepted, as has been rightly observed by the Greek Government, in its written observations, and the Advocate General, at point 53 of his Opinion, that a refusal by the institution of the place of stay to apply Article 31 of Regulation No 1408/71 and its requirement for production of a Form E 112 cannot be equated to a failure to carry out a formality provided for in Article 31 of Regulation No 574/72.

**60.** However, as may be seen from paragraphs 50 to 52 above, in the presence of such a refusal and such a requirement, it is for the competent institution of the place of residence which has previously issued its insured person with a Form E 111 to contribute to facilitating the correct application of Article 31 of Regulation No 1408/71.

**61.** Accordingly, where it appears that the institution of the place of stay has wrongly refused to give effect to that provision and the institution of the place of residence, on being advised of that refusal, has declined to contribute, as it is obliged to, to facilitating the correct application of that provision, it is for the latter institution, without prejudice to the possible liability of the institution of the place of stay, to reimburse directly to the insured person the cost of the treatment he has had to bear, so as to guarantee him a level of funding equivalent to that which he would have enjoyed had the provisions of that article been complied with (see, by analogy, Case C-368/98 *Vanbraekel and Others* [2001] ECR I-5363, paragraph 34).

**62.** Moreover, as such reimbursement takes the place in such a case of the benefits in kind which Article 31 of Regulation No 1408/71 guarantees to pensioners, a Member State cannot make the reimbursement conditional on any authorisation procedure, or on the requirement that the illness which necessitated the treatment in question manifested itself suddenly during the stay in another Member State, making the provision of that treatment immediately necessary.

**63.** Having regard to all the foregoing, the answer to the first question referred must be as follows:

Article 31 of Regulation No 1408/71 must be interpreted as meaning that enjoyment of the benefits in kind guaranteed by that provision to pensioners staying in a Member State other than their State of residence is not subject to the condition that the illness which necessitated the treatment in question manifested itself suddenly during such a stay, making that treatment immediately necessary. That provision therefore precludes a Member State from subjecting that enjoyment to such a condition.

Article 31 of Regulation No 1408/71 precludes a Member State from subjecting the enjoyment of the benefits in kind guaranteed by that provision to any authorisation procedure.

The provision and funding of the benefits in kind referred to in Article 31 of Regulation No 1408/71 must normally take place in accordance with the provisions of that article in conjunction with Article 36 of that regulation and Articles 31 and 93 of Regulation No 574/72.

Where it appears that the institution of the place of stay has wrongly refused to provide the benefits in kind referred to in Article 31 of Regulation No 1408/71 and the institution of the place of residence, on being advised of that refusal, has declined to contribute, as it is obliged to, to facilitating the correct application of that provision, it is for the latter institution, without prejudice to the possible liability of the institution of the place of stay, to reimburse directly to the insured person the cost of the treatment he has had to bear, so as to guarantee him a level of funding equivalent to that which he would have enjoyed had the provisions of that article been complied with.

In the latter case, Articles 31 and 36 of Regulation No 1408/71 and Articles 31 and 93 of Regulation No 574/72 preclude national legislation from subjecting such reimbursement to the obtaining of *ex post facto* authorisation which is granted only in so far as it is shown that the illness which necessitated the treatment in question manifested itself suddenly during the stay, making that treatment immediately necessary.

#### **Questions 2, 3, 4 and 5**

**64.** It is apparent from the wording of the second, third, fourth and fifth questions referred that they are asked only in case the answer to the first question is that Articles 31 and 36 of Regulation No 1408/71 and Articles 31 and 93 of Regulation No 574/72 do not preclude the application of legislation such as that at issue in the main proceedings. In view of the answer which has been given to the first question, there is therefore no need to examine those questions.

#### **Costs**

**65.** The costs incurred by the Greek, Belgian, Spanish, Irish, Netherlands, Austrian, Finnish and United Kingdom Governments and by the Commission, which have submitted observations to the Court, are not recoverable. 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.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Diikitiko Protodikio Thessalonikis by order of 31 January 2000, hereby rules:

1. Article 31 of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, as amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983, as amended by Council Regulation (EC) No 3096/95 of 22 December 1995, must be interpreted as meaning that enjoyment of the benefits in kind guaranteed by that provision to pensioners staying in a Member State other than their State of residence is not subject to the condition that the illness which necessitated the treatment in question manifested itself suddenly during such a stay, making that treatment immediately necessary. That provision therefore precludes a Member State from subjecting that enjoyment to such a condition.

2. Article 31 of Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95, precludes a Member State from subjecting the enjoyment of the benefits in kind guaranteed by that provision to any authorisation procedure.

3. The provision and funding of the benefits in kind referred to in Article 31 of Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95, must normally take place in accordance with the provisions of that article in conjunction with Article 36 of that regulation and Articles 31 and 93 of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95.

4. Where it appears that the institution of the place of stay has wrongly refused to provide the benefits in kind referred to in Article 31 of Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95, and the institution of the place of residence, on being advised of that refusal, has declined to contribute, as it is obliged to, to facilitating the correct application of that provision, it is for the latter institution, without prejudice to the possible liability of the institution of the place of stay, to reimburse directly to the insured person the cost of the treatment he has had to bear, so as to guarantee him a level of funding equivalent to that which he would have enjoyed had the provisions of that article been complied with.

5. In the latter case, Articles 31 and 36 of Regulation No 1408/71, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95, and Articles 31 and 93 of Regulation No 574/72, as amended and updated by Regulation No 2001/83, as amended by Regulation No 3096/95, preclude national legislation from subjecting such reimbursement to the obtaining of *ex post facto* authorisation which is granted only in so far as it is shown that the illness which necessitated the treatment in question manifested itself suddenly during the stay, making that treatment immediately necessary.

Rodríguez Iglesias Wathelet Schintgen

Timmermans Gulmann Edward

La Pergola Jann Skouris

Macken Colneric

von Bahr Cunha Rodrigues

Delivered in open court in Luxembourg on 25 February 2003.

R. Grass G.C. Rodríguez Iglesias

Registrar President