JUDGMENT OF THE COURT
11 June 1991 *

In Case C-251/89,

REFERENCE to the Court under Article 177 of the EEC Treaty by the Sozialgericht Nürnberg (Social Court Nuremberg) (Federal Republic of Germany), for a preliminary ruling in the proceedings pending before that court between

Nikolaos Athanasopoulos

Stamatina Defingou

Rosina Falcone

Rosario Giganti

Eleni Kitsou

Mariano Lorenzo-Bozosa

Agostino Palermo

Chariklia Papadimitriou

José Rodríguez Martínez

Francisco Torres Dona

and

Bundesanstalt für Arbeit

on the interpretation of Articles 77, 78 and 81(a) and (d) of Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes

* Language of the case: German

to employed persons, to self-employed persons and to members of their families moving within the Community, as codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6),

THE COURT,

composed of: O. Due, President, T. F. OüHiggins, J. C. Moitinho de Almeida, and M. Díez de Velasco (Presidents of Chambers), C. N. Kakouris, F. A. Schockweiler, F. Grévisse, M. Zuleeg and P. J. G. Kapteyn, Judges,

Advocate General: W. Van Gerven,
Registrar: H. A. Rühl, Principal Administrator,

after considering the written submissions submitted on behalf of:

— N. Athanasopoulos and S. Defingou, by H. Runft, Legal Assessor at the advisory centre for returning Greek nationals, Athens,

— R. Falcone, represented by L. Fazi, Welfare Secretary of the Patronato ACLI, Augsburg,

— R. Giganti and A. Palermo, represented by J. Stahlberg, Rechtsanwalt, Munich,

— M. Lorenzo-Bozosa, by J. Prieto Peláez, Head of the Welfare Department of the Spanish Consulate General, Munich,

— the German Government, by E. Röder and J. Karl, acting as Agents,

— the Italian Government, by P. G. Ferri, Avvocato dello Stato, acting as Agent,

— the Commission of the European Communities, by K. Banks, a member of its Legal Service, acting as Agent, assisted by B. Schulte, of the Max-Planck Institut für ausländisches und internationales Sozialrecht (Institute for Foreign and International Social Security Law), Munich,

having regard to the Report for the Hearing,

after hearing the oral observations of N. Athanasopoulos, S. Defingou, R. Falcone, R. Giganti, A. Palermo, M. Lorenzo-Bozosa, F. Torres Dona, represented by L. Enríquez Paradella, a member of the Spanish Embassy in Bonn, the German Government, the Italian Government and the Commission, at the hearing on 5 December 1990.

after hearing the Opinion of the Advocate General at the sitting on 24 January 1991,

gives the following

Judgment

1 By order of 29 June 1989, which was received at the Court Registry on 8 August 1989, the Sozialgericht Nürnberg referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty several questions on the interpretation of Articles 77, 78 and 81(a) and (d) 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 codified by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6).

2 Those questions were raised in the context of ten cases, which have been joined by the national court, between nationals of Member States other than the Federal

Republic of Germany and the Bundesanstalt für Arbeit (Federal Labour Office), a German institution responsible for the implementation of the Bundeskindergeldgesetz (Federal Law on Child Allowances).

3 The applicants in the main proceedings all reside in the territory of Member States other than the Federal Republic of Germany but have in the past been engaged as workers or self-employed persons in the Federal Republic of Germany or are the successors in title of such workers or persons.

4 Several of the applicants in the main proceedings are in receipt of both a pension under the German legislation and a pension under the legislation of the Member State in which they reside. Some also draw pensions payable as a result of industrial accidents. It is also apparent from the order for reference that several applicants who draw pensions are also in receipt of family allowances under the legislation of the Member State in which they reside.

5 Several other applicants in the main proceedings have in their care orphans whose deceased parent was subject, as an employed or self-employed person, to the legislation of the Federal Republic of Germany and to that of the Member State of the orphan's residence. Some of them are in receipt of family allowances under the legislation of that Member State.

6 All the applicants in the main proceedings claimed child allowance under the Bundeskindergeldgesetz or a supplement equal to the difference between the amount of that allowance and the amount of family allowances provided for by the legislation of the Member State in whose territory they resided.

7 The national court considers that the child allowances under the Bundeskindergeldgesetz constitutes a benefit for children dependent on pensioners, within the meaning of Article 77(1) of Regulation No 1408/71, at least where that allowance is claimed by a person drawing a pension other than a pension for an accident at

work. It further considers that, where that allowance is claimed for the orphan of a deceased employed or self-employed person, it must be deemed to be orphans' benefits, within the meaning of Article 78(1) of Regulation No 1408/71. In that connection the national court refers to the declaration made by the Federal Republic of Germany under Article 5 of that regulation and observes that the child allowance provided for in the Bundeskindergeldgesetz is mentioned in that declaration as being a benefit referred to in Articles 77 and 78 of Regulation No 1408/71.

8 Pursuant to Article 77(2)(b)(i) of that regulation, benefits for the dependent children of pensioners are to be granted 'to a pensioner who draws pensions under the legislation of more than one Member State ... in accordance with the legislation of whichever of these States he resides in ...' Similarly, by virtue of Article 78(2)(b)(i) of that regulation, orphans' benefits are to be granted 'for the orphan of a deceased employed or self-employed person who was subject to the legislation of several Member States ... in accordance with the legislation of the Member State in whose territory the orphan resides ...'.

9 On 17 October 1985, the Administrative Commission on Social Security for Migrant Workers (hereinafter referred to as the 'Administrative Commission') adopted Decision No 129 concerning the application of Articles 77, 78 and 79(3) of Regulation No 1408/71 and of Article 10 (1)(b)(ii) of Regulation No 574/72 (Official Journal 1986 C141, p. 7, hereinafter referred to as 'Decision No 129').

10 Paragraph 1 of Decision No 129 states: 'Where the amount of the benefits specified in Article 77(1) of Regulation (EEC) No 1408/71 which were received by the person who is entitled to a pension due under the legislation of a Member State where he was residing is higher than the amount of the benefits that he receives under the legislation of another Member State to which he has transferred his place of residence and under whose legislation a pension is also due, Article 77(2) must be applied ... in such a way that entitlement to benefits under the legislation of the first Member State is maintained in so far as the amount thereof

exceeds the amount of benefits actually received under the legislation of the new country of residence.' Paragraph 5 of Decision No 129 provides that in such a case the competent institution of the first Member State is to pay a supplement to the benefits granted under the legislation of the second Member State equal to the difference between the amount of the benefits actually received under that legislation and the amount of the benefits due under the legislation of the first Member State.

11 Moreover, under Paragraphs 2 and 5 of Decision No 129 identical rules apply to the grant of the benefits referred to in Article 78(1) of Regulation No 1408/71, where the orphan transfers his place of residence from a Member State under whose legislation those benefits were granted to another Member State under whose legislation such benefit is payable for that orphan.

12 Decision No 129 also sets out the methods of calculation and payment of the supplement to the benefits payable to the pensioner, or for the orphan, in accordance with paragraphs 1, 2 and 5 of that decision, as well as the obligations imposed on the competent institutions of the Member States concerned. In that connection it provides that the competent institution of the Member State in which the pensioner, or the orphan, resides is to communicate certain information to the competent institution of the Member State liable to pay the benefits supplement.

13 Before the national court, and during the administrative procedure prior to the initiation of legal proceedings before it, the defendant in the main proceedings, the Bundesanstalt, contested the applicants' claims on the ground in particular that by virtue of Articles 77 and 78 of Regulation No 1408/71 benefits for children dependent upon pensioners and orphans' benefits had to be granted, having regard to the applicants' situation, in accordance with the legislation of the Member State in whose territory they resided. Furthermore, it stressed that the Bundeskindergeldgesetz made payment of child allowance conditional on the child in question and the person on whom he or she is dependent residing in Germany. That condition is not satisfied in the case of the applicants in the main proceedings.

14 Furthermore, inasmuch as the applicants in the main proceedings relied in support of their claim on Decision No 129, the Bundesanstalt contended that that decision cannot confer rights contained neither in Regulation No 1408/71 nor in the legislation of the Member States. Moreover, Decision No 129, it stressed, cannot be implemented by its departments since it does not specify the institution, in each Member State, responsible for communicating the information mentioned in that Decision for calculating the benefits supplement, to the competent institution of the Member State liable to pay that supplement. In certain Member States several institutions might be called upon to provide that information. According to the Bundesanstalt the fact that Decision No 129 does not specify the institution responsible for providing the information in question makes its implementation difficult, if not impossible.

15 Under those circumstances the national court decided to stay the proceedings until the Court had given a preliminary ruling on the following questions:

'1. Is a Member State which grants a pension to a migrant worker previously employed and insured there — or to his orphans — required under Articles 77 and 78 of Regulation (EEC) No 1408/71 to pay a sum representing the difference between the family allowances payable there and the family allowances of another Member State in which the pensioner and his children — or his orphans — reside and which also grants a pension, if a condition of entitlement to family allowances under the national law of the first Member State (in this case, child allowance (Kindergeld) payable under the Bundeskindergeldgesetz) is that not only the claimant but also the qualifying child are resident in that State? Is Article 77 of Regulation (EEC) No 1408/71, if read in conjunction with the declaration of the Federal Republic of Germany of 9 June 1980 (Official Journal 1980 C 139, p. 1, at p. 7), applicable to a person receiving a German invalidity pension on account of an accident at work where that person applies for a German child allowance?

2. Does such entitlement also exist when the pension entitlement does not arise until after the transfer of residence to the home country? In those circumstances, is a child allowance payable to a pensioner only in respect of those members of his family who qualified for it prior to his transfer of residence, or in respect of all those who are members of his family at the time when he receives the pension — including those who were not born until after he had transferred his residence?

3. If entitlement to a child allowance has arisen by virtue of Articles 77 and 78 of Regulation (EEC) No 1408/71, is the full amount then payable or is it reduced by reference to income, in accordance with the German provisions on reductions (namely Paragraphs 10 and 11 of the Bundeskindergeldgesetz)? How, if necessary, is the income-related part to be calculated? How, if necessary, are the net earnings which depend on tax-free amounts and other tax rebates, accruing to the pensioner or to the orphan and his or her family in another Member State to be quantified and taken into account as part of the relevant income for child allowance purposes?

4. Is Decision No 129 of the Administrative Commission of 17 October 1985 adequate in the light of Article 81(a) and (d) of Regulation (EEC) No 1408/71? In particular, is it one of the duties of the Administrative Commission to introduce a set of rules laying down which of several possible institutions of another Member State is to issue a binding notice?'

16 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the relevant provisions, the procedure and the written observations submitted to the Court, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The first question

17 With regard to the first part of the national court's first question, it should be pointed out at the outset that, in accordance with consistent case-law, Article 77(2)(b)(i) and Article 78(2)(b)(i) of Regulation No 1408/71 cannot be interpreted in such a way as to deprive a worker, or an orphan of a deceased worker, of more favourable benefits as a result of the substitution of benefits afforded by one Member State for the benefits payable by another Member State. Consequently, if in the cases referred to in those provisions, the amount of benefits paid by the State of residence is lower than that of the benefits granted by the other Member State which is responsible for payment, the worker, or the orphan of the deceased worker, retains the right to the higher amount and is entitled to receive from the competent institution of the latter State a benefit supplement equal to the difference between those two amounts (see judgment in Case 1/88 *Baldi* v *Caisse de Compensation pour Allocations Familiales* [1989] ECR 667, and also judgment in Case 807/79 *Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205, paragraph 8).

18 In the first part of the first question the national court is essentially seeking to ascertain whether a worker and an orphan of a deceased worker are entitled to such a benefit supplement where the legislation of the Member State granting the more favourable benefits makes the grant of those benefits subject to the condition that the claimant and the qualifying child reside within national territory.

19 In that connection it should be emphasized that Regulation No 1408/71 must be interpreted in the light of the objective pursued by Article 51 of the Treaty, under which it was adopted, namely to ensure freedom of movement for workers.

20 However, that objective would not be achieved if, in addition to the cases expressly provided for in the Community rules in accordance with the Treaty objectives, the legislation of a Member State made the grant of social security advantages due under that legislation subject to the condition that the worker should reside in the territory of that Member State. With respect to benefits for dependent children of pensioners and orphans' benefits, Article 77(2) and Article 78(2) of Regulation No 1408/71 expressly provide that those benefits are to be granted, in accordance with the rules laid down in those provisions, irrespective of the Member State in whose territory the pensioner or the children or the orphan or the person actually maintaining him is resident.

21 Moreover, entitlement to a benefit supplement for orphans or for the dependent children of pensioners is conferred on orphans and pensioners specifically when they are not resident within the territory of the Member State granting the most favourable benefits. Consequently, it would be entirely without purpose to confer such entitlement if the legislation of that Member State were to make the grant of the benefits subject to the condition that both the claimant and the qualifying child reside within national territory and that condition could be relied on against the orphan and the pensioner claiming the benefit supplement.

22 Accordingly, the reply to be given to the first part of the national court's first question should be that where, in the cases referred to in Article 77(2)(b)(i) and Article 78(2)(b)(i) of Regulation No 1408/71, the amount of the benefits paid by the Member State of residence is less than the amount of the benefits payable by another Member State, the pensioner, or the orphan of the deceased worker, is entitled to receive from the competent institution of the latter State a benefit supplement equal to the difference between the two amounts, even where under the legislation of that State the grant of the benefits is subject to the condition that both the claimant and the qualifying child reside within its national territory.

23 It is apparent from the order for reference that in the second part of the first question the national court is seeking to ascertain whether, in view of the declaration made by the Federal Republic of Germany in accordance with Article 5 of Regulation No 1408/71, Article 77 of that regulation applies to the child allowance provided for under the Bundeskindergeldgesetz when that allowance is claimed by a person drawing a pension in respect of an accident at work.

24 In that connection the national court observes that under Article 77(1) of Regulation No 1408/71 pension supplements granted for children of persons drawing pensions under insurance covering accidents at work and occupational diseases are excluded from the scope of Article 77. It considers that such an exclusion could be interpreted as meaning that all family benefits granted for children of such pensioners fall outside the scope of Article 77.

25 Pursuant to Article 5 of Regulation No 1408/71 the Member States are to 'specify . . . the benefits referred to in Articles 77 and 78 in declarations to be notified and published in accordance with Article 97'.

26 In the declaration provided for in Article 5 of Regulation No 1408/71 (Official Journal 1980 C 139, p. 1), as amended (Official Journal 1983 C 351, p. 1), the Federal Republic of Germany stated that 'children allowances' provided for under the 'Law concerning children's allowances (Bundeskindergeldgesetz) of 14 April 1964, with amendments and supplements, in the applicable version' constituted benefits referred to in Article 77 of the Regulation.

27 That declaration contains no exception for the case where the child allowance provided for in the Bundeskindergeldgesetz is paid in whole or in part to persons drawing pensions for accidents at work.

28 The fact that certain benefits provided for under a national law or national rules for the dependent children of pensioners were not mentioned in the declaration referred to in Article 5 of Regulation No 1408/71 does not in itself establish that those benefits do not constitute benefits for the purposes of Article 77 of that regulation. Where such benefits were mentioned in that declaration they are to be regarded as benefits for the purposes of Article 77 of the Regulation.

29 Consequently, the reply to the second part of the first question should be that, in view of the declaration made by the Federal Republic of Germany pursuant to Article 5 of Regulation No 1408/71, the child allowance provided for in the Bundeskindergeldgesetz must be regarded as a benefit referred to in Article 77 of that regulation where that allowance is claimed by a person drawing an industrial accident pension.

The second question

30 It is apparent from the order for reference that in the second question the national court is seeking to ascertain, first, whether a worker who draws a pension under

the legislation of the Member State on whose territory he resides and who acquires a right to the grant of a pension under the legislation of the Member State granting more favourable benefits is entitled, after transferring his residence to the first Member State, to a benefit supplement payable by the first Member State. Secondly, the national court is seeking to ascertain whether the benefit supplement must be calculated taking account of the children of the pensioner born after the transfer of residence to the Member State granting less favourable benefits.

31 In that connection the national court points out that in the judgment in Case 733/79 *CCAF* v *Laterza* [1980] ECR 1915, the Court stated that Article 77(2)(b)(i) of Regulation No 1408/71 had to be interpreted as meaning that entitlement to family benefits from the State in whose territory the recipient of an invalidity pension resided did not take away the right to higher benefits awarded previously by another Member State. According to the national court, the right to a benefit supplement payable by the Member State granting more favourable benefits might, consequently, seek to guarantee solely the maintenance of rights acquired prior to the change of residence.

32 First of all, it should be pointed out that entitlement to the benefits referred to in Article 77 of Regulation No 1408/71 is linked to entitlement to the grant of a pension. It follows from Article 77(2) that those benefits are granted in accordance with the legislation of the Member State or of one of those Member States responsible for payment of a pension to the person concerned.

33 It should also be noted that recognition of entitlement to the benefit supplement seeks to promote freedom of movement for workers by ensuring that those concerned obtain the amount of benefits which would have been granted to them if they had continued to reside in the Member State granting the most favourable benefits.

34 If entitlement to that supplement were not conferred on workers acquiring a right to the grant of a pension under the legislation of the Member State granting the

most favourable benefits, following the transfer of their residence to the territory of the other Member State responsible for paying a pension to them, an obstacle would arise to freedom of movement for workers.

35 In that case workers would be prompted to maintain their residence in the territory of the Member State granting the most favourable benefits until the date on which they were entitled to the grant of a pension under the legislation of that Member State, in order to receive those benefits.

36 Such a situation would run counter to the objective pursued by Regulation No 1408/71 which justifies recognition of entitlement to a benefit supplement.

37 Those considerations also require the benefit supplement to be granted in respect not only of the pensioner's dependent children born before the transfer of his residence to the Member State granting the less favourable benefits, but also children born after the transfer of residence.

38 Accordingly, the reply to be given to the first part of the national court's second question should be that entitlement to the benefit supplement for dependent children of pensioners exists even where the pensioner becomes entitled to a pension under the legislation of the Member State granting more favourable benefits after he transfered his residence to another Member State which is responsible for payment of benefits under Article 77(2) of Regulation No 1408/71. Moreover, in reply to the second part of the second question it should be stated that the benefit supplement must be granted having regard to all the dependent children of the pensioner, including those born after he transferred his residence to the Member State which grants the less favourable benefits.

The third question

39 It should be observed at the outset that under Article 177 of the EEC Treaty the Court is not competent to rule on the interpretation of national legislation or regulations. It may, however, give a ruling on the interpretation of Community law in order to enable the national court to resolve the legal problem before it.

40 The third question should therefore be construed as seeking to ascertain whether, where the legislation of the Member State responsible for paying benefits under Article 77 or Article 78 of Regulation No 1408/71, or a benefit supplement, provides for a reduction in the amount of such benefits according to the net annual income of the recipient and the members of his family, Articles 77 and 78 of Regulation No 1408/71 permit such abatement where the recipient of the benefits, or of the benefit supplement, resides in another Member State. If so, the national court asks, how is the net annual income of the beneficiary and the members of his family to be determined and taken into account in calculating the amount of benefits, or benefit supplement, to which the recipient is entitled, without infringing the rules of Community law.

41 With regard to the first part of this question it is necessary to examine separately the case where the Member State whose legislation provides for a reduction in the benefits referred to in Article 77 or Article 78 of Regulation No 1408/71 according to the net annual income of the recipient and the members of his family is the Member State responsible for payment of the benefits under Article 77(2) or Article 78(2), and the case where the Member State whose legislation provides for such a reduction is the one from which the payment of a benefit supplement is claimed.

42 With regard to the first case, it should be noted that under Article 77 of Regulation No 1408/71 benefits for dependent children of pensioners are granted in accordance with the legislation of the Member State specified in Article 77(2), irrespective of the Member State in whose territory the pensioner or the children reside. Similarly, under Article 78 of that regulation, orphans' benefits are granted in accordance with the legislation of the Member State specified in Article 78(2),

irrespective of the Member State in whose territory the orphan or the person actually maintaining him resides.

43 Consequently, when the national legislation applicable under Article 77(2) or Article 78(2) of Regulation No 1408/71 provides for a reduction in the amount of benefits according to the net annual income of the recipient of those benefits and the members of his family, Articles 77 and 78 of that regulation permit such a reduction where the recipient of the benefits resides in the territory of a Member State other than the Member State responsible for the payment of benefits.

44 With regard to the case where the Member State whose legislation provides for such a reduction is the one from which the payment of a benefit supplement is being claimed, recognition of entitlement to such a supplement is intended to ensure that those concerned obtain the amount of benefits which would have been granted to them had they continued to reside in the territory of the Member State granting the more favourable benefits.

45 Consequently, in order to determine whether the claimant is entitled to a benefit supplement from a Member State and to calculate the amount thereof, a comparison should be made between the amount of the benefits actually received in the Member State to which he has transferred his residence and the amount of benefits which he would have received if he had continued to reside in the territory of the Member State from which the payment of the supplement is claimed.

46 Consequently, where the legislation of the Member State from which a benefit supplement is claimed provides for a reduction in the amount of benefits according to the net annual income of the recipient and the members of his family, that reduction may also be applied where the person concerned resides in another Member State.

47 In order to reply to the second part of the third question, it is necessary to apply the relevant provisions of the legislation of the Member State responsible for

payment of the benefits or the benefit supplement as if the recipient and the members of his family residing in the same Member State as him were residing in the Member State responsible for payment and were in receipt there of the income which they receive in the Member State of residence.

48 In that connection, the competent institution of the Member State responsible for payment may request the recipient of the benefits or the benefit supplement and the competent authorities of the Member State of residence to supply all information necessary for calculating, under the legislation of the Member State responsible for payment, the net annual income of the person concerned and the members of his family, together with evidence attesting the accuracy of the information supplied.

49 However, the competent institution of the Member State responsible for payment may not request the person concerned to provide information and supporting evidence other than could be provided by a reasonably diligent person residing in the same Member State. Moreover, where the person concerned does not provide the information or supporting evidence requested, a penalty may be imposed on him only if an identical penalty is imposed on the recipients of the same benefits residing in the territory of the Member State responsible for payment who fail to provide the same or equivalent information or supporting evidence.

50 Consequently, the reply to the national court's third question should be that, where the legislation of the Member State responsible for payment of the benefits referred to in Article 77 or Article 78 of Regulation No 1408/71 or a benefit supplement provides for a reduction in the amount of such benefits according to the net annual income of the recipient and the members of his family, the said Articles 77 and 78 authorize such a reduction where the recipient resides in a Member State other than the Member State responsible for payment. In order to determine in such a case the net annual income of the recipient and the members of his family and to calculate the amount of benefits or the benefit supplement to which the recipient is entitled, the competent institution of the Member State responsible for payment must apply the relevant provisions of the legislation of that State as if the recipient and the members of his family residing in the same State as him resided in the Member State responsible for payment and received in that State the income which they receive in the Member State of residence, and, to this end, the competent institution is to rely on the information and supporting evidence at its request by the recipient of the benefits and by the competent authorities of the Member State of residence.

The fourth question

51 It is apparent from the documents in the case that in its fourth question the national court is seeking to ascertain how the competent institution of the Member State responsible for payment of the benefit supplement may obtain the official information referred to in Decision No 129. In particular, it is asking whether it is for the Administrative Commission under Article 81(a) and (d) of Regulation No 1408/71 to designate the institution of each Member State which may be required to supply that information to the competent institution of the Member State responsible for payment of the benefit supplement.

52 In that connection it should be pointed out that under Article 81(a) of Regulation No 1408/71, the Administrative Commission has the duty 'to deal with all administrative questions and questions of interpretation arising from this Regulation ... without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislations of Member States, by this Regulation or by the Treaty'.

53 The question which of the possible institutions in each Member State is to supply the information necessary for calculating the benefit supplement is an administrative decision under Regulation No 1408/71.

54 Consequently, the designation of that institution is, by virtue of Article 81(a) of Regulation No 1408/71, a matter for the Administrative Comission.

55 It should, nevertheless, be pointed out that practical difficulties in the implementation of Regulation No 1408/71 cannot relieve the national social security institutions of the obligations imposed on them by that regulation. Moreover, although the Administrative Commission is in fact entrusted with the task of settling all administrative questions arising out of Regulation No 1408/71, it is

clear from the actual wording of Article 81(a) of that regulation that the competence assigned to the Administrative Commission in no way precludes recourse to other procedures in order to resolve those questions.

56 In that connection, where a person residing in one Member State claims to be entitled to a benefit supplement payable by another Member State under Article 77 or Article 78 of Regulation No 1408/71, the competent institution of the latter Member State may obtain information from the Commission and the authorities of the Member State in whose territory the claimant is residing, in order to discover the name of the competent institution for supplying the information referred to in Decision No 129.

57 It is clear from Article 84(3) of Regulation No 1408/71 that in the application of that regulation the authorities and institutions of the Member States may communicate directly between themselves. Moreover, in accordance with Article 5 of the Treaty, the Commission and the Member State in which the person claiming a benefit supplement is residing are bound by a duty to cooperate in good faith with the institutions of the other Member States which are responsible for ensuring the performance of the obligations arising out of Regulation No 1408/71.

58 The reply to the national court's fourth question should therefore be that it is for the Administrative Commission, pursuant to Article 81(a) of Regulation No 1408/71 to draw up the list of institutions in the Member States which are responsible for providing the official information mentioned in Decision No 129. The competent institution of the Member State from which a benefit supplement is claimed may, however, still apply to the Commission and to the authorities of the Member State in which the claimant resides in order to ascertain the name of the institution in the latter Member State which is competent to provide the official information referred to in Decision No 129.

Costs

59 The costs incurred by the German and Italian Governments and by the Commission of the European Communities, 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 submitted to it by the Sozialgericht Nürnberg, by order of 29 June 1989, hereby rules:

(1) Where, in the cases referred to in Article 77(2)(b)(i) and Article 78(2)(b)(i) 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 codified by Council Regulation (EEC) No 2001/83 of 2 June 1983, the amount of the benefits paid by the Member State of residence is less than the amount of the benefits payable by another Member State, the pensioner, or the orphan of the deceased worker, is entitled to receive from the competent institution of the latter Member State a benefit supplement equal to the difference between those two amounts, even where under the legislation of that State the grant of the benefits is subject to the condition that both the claimant and the qualifying child reside within its national territory;

(2) In view of the declaration made by the Federal Republic of Germany pursuant to Article 5 of Regulation (EEC) No 1408/71, the child allowance provided for in the Bundeskindergeldgesetz must be regarded as a benefit referred to in Article 77 of that regulation where the allowance is claimed by a person drawing an industrial accident pension;

(3) Entitlement to the benefit supplement for dependent children of pensioners exists even where the pensioner becomes entitled to a pension under the legislation of the Member State granting more favourable benefits after he transferred his residence to another Member State which is responsible for payment of benefits under Article 77(2) of Regulation (EEC) No 1408/71;

(4) The benefit supplement for dependent children of pensioners must be granted having regard to all the dependent children of the pensioner, including those born after he transferred his residence to the Member State which grants the less favourable benefits;

(5) Where the legislation of the Member State responsible for the payment of the benefits referred to in Article 77 or Article 78 of Regulation (EEC) No 1408/71 or a benefit supplement provides for a reduction in the amount of such

benefits according to the net annual income of the recipient and the members of his family, the said Articles 77 and 78 authorize such a reduction where the recipient resides in a Member State other than the Member State responsible for payment. In order to determine in such a case the net annual income of the recipient and the members of his family and to calculate the amount of benefits or the benefit supplement to which the recipient is entitled, the competent institution of the Member State responsible for payment must apply the relevant provisions of the legislation of that State as if the recipient and the members of his family residing in the same State as him resided in the Member State responsible for payment and received in that State the income which they receive in the Member State of residence, and, to this end, the competent institution is to rely on the information and supporting evidence provided at its request by the recipient and by the competent authorities of the Member State of residence;

(6) It is for the Administrative Commission on Social Security for Migrant Workers, pursuant to Article 81(a) of Regulation (EEC) No 1408/71, to draw up the list of institutions in the Member States which are responsible for providing the official information referred to in Decision No 129 of 17 October 1985 concerning the application of Articles 77, 78 and 79(3) of Regulation (EEC) No 1408/71 and of Article 10(1)(b)(ii) of Regulation (EEC) No 574/72. The competent institution of the Member State from which a benefit supplement is claimed may, however, still apply to the Commission and to the authorities of the Member State in which the claimant resides in order to ascertain the name of the institution in the latter Member State which is competent to provide the official information referred to in Decision No 129.

Due O'Higgins Moitinho de Almeida Díez de Velasco

Kakouris Schockweiler Grévisse Zuleeg Kapteyn

Delivered in open court in Luxembourg on 11 June 1991.

J.-G. Giraud
Registrar

O. Due
President