REPORT FOR THE HEARING
in Case C-251/89 *

I — Facts and procedure

1. *Community provisions*

Article 77 of Regulation No 1408/71 concerns the granting of benefits for dependent children of pensioners.

Pursuant to its first paragraph, Article 77 applies to the following benefits:

'family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases'.

The legislation applicable to the granting of the abovementioned benefits is determined in accordance with Article 77(2), which provides in particular that:

'Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children are residing:

(a) ...

(b) to a pensioner who draws pensions under the legislation of more than one Member State:

(i) in accordance with the legislation of whichever of these States he resides in provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State; or

(ii) ...'

Article 78 of Regulation No 1408/71 concerns the granting of benefits for orphans. Article 78(2) provides that:

'Orphans' benefits shall be granted in accordance with the following rules, irres-

* Language of the case: German.

pective of the Member State in whose territory the orphan or the natural or legal person actually maintaining him is resident:

(a) ...

(b) for the orphan of a deceased employed or self-employed person who was subject to the legislation of several Member States:

(i) in accordance with the legislation of the Member State in whose territory the orphan resides provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), a right to one of the benefits referred in paragraph 1 is acquired under the legislation of that State; or

(ii) ...'.

On 17 October 1985 the Administrative Commission on Social Security for Migrant Workers adopted, pursuant to Article 81(a) of Regulation No 1408/71, Decision No 129 concerning the application of Article 77, 78 and 79(3) of Regulation (EEC) No 1408/71 and of Article 10(1)(b)(ii) of Regulation (EEC) No 574/72 (Official Journal 1986 C 141, p. 7; hereinafter referred to as 'Decision No 129'). Referring in particular to the judgments of the Court in Case 733/79 (*CCAF* v *Laterza* [1980] ECR 1915), Case 807/79 (*Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205) and Case 320/82 (*D'Amario* v *Landesversicherungsanstalt Schwaben* [1983] ECR 3811), the Administrative Commission stated that where the amount of the benefits specified in Articles 77 and 78 of Regulation No 1408/71 which were received by the person who is entitled to a pension or to an orphan due under the legislation of a Member State 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, 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 Member State of residence (Paragraphs 1 and 2 of Decision No 129). According to Paragraph 5 of Decision No 129, the supplement to the benefits which must be paid by the competent institution of the first Member State is to be determined:

'taking account solely of children or orphans in respect of whom entitlement existed before the place of residence was transferred ... or at such time as rights are simultaneously acquired under the legislation of one Member State alone and under the legislation of another Member State in accordance with the Community provisions'.

Furthermore, Decision No 129 contains various provisions concerning the procedure by which claims for benefits supplements are considered by the competent institutions of the Member States concerned.

2. *National legislation*

(a) Child allowance

Under Paragraph 1, subparagraph 1(1), of the Bundeskindergeldgesetz (Federal Law on Child Allowance), the following are entitled to a child allowance:

'any person domiciled or normally resident within the territory covered by this Law'.

However, the first sentence of Paragraph 2, subparagraph 5, provides that:

'no account shall be taken of children who are not domiciled or normally resident within the territory covered by this Law'.

An identical residency condition applies to the granting of allowances to children who have lost both parents (Paragraph 1, subparagraph 2, of the Bundeskindergeldgesetz).

Moreover, Paragraph 8 of the Bundeskindergeldgesetz provides that a person receiving a pension increase or supplement in respect of a dependent child (see point (b) below) can receive a child allowance only in so far as the amount thereof exceeds the increase or supplement for the dependent child.

Paragraphs 10 and 11 of the Bundeskindergeldgesetz contain provisions concerning the calculation of the child allowance. Paragraph 10 of the Bundeskindergeldgesetz provides that the amount of the allowance increases in proportion to the number of children but is reduced progressively according to the annual income of the claimant and his or her spouse. However, it may not be less than a minimum amount laid down by the Bundeskindergeldgesetz.

The term 'annual income' is defined in Paragraph 11, subparagraph 1, of the Bundeskindergeldgesetz as follows:

'The annual income shall be the amount of income, within the meaning of Paragraph 3, subparagraphs 1 and 2 of the Einkommensteuergesetz (Income Tax Law) in the calendar year defined in accordance with subparagraphs 3 or 4 . . .'.

Certain expenses, listed in Paragraph 11, subparagraph 2, of the Bundeskindergeldgesetz, are deducted from the amount of income in order to determine the annual income. Those expenses include income tax, fiscally recognized welfare expenses and certain expenses incurred for the maintenance of others.

(b) Increase and supplement in respect of a dependent child

Under Paragraph 1262 of the Reichsversicherungsordnung (National Social Insurance Code), invalidity and retirement pensions are increased in respect of dependent children. Similarly, pursuant to Paragraph 583, subparagraph 1, of the

Reichsversicherungsordnung, those drawing a pension for an accident at work or for an occupational disease are entitled, under certain conditions, to a supplement in respect of a dependent child.

Those benefits are granted to the pensioners in question only if they were entitled to the pensions before 1 January 1984. For those who started to receive pensions after 31 December 1983, and for children born after that date, the increase and the supplement for a dependent child are replaced by the child allowance provided for in the Bundeskindergeldgesetz.

Under Paragraph 1316, subparagraph 1, and Paragraph 1321, subparagraph 3, of the Reichsversicherungsordnung, the increase for a dependent child is granted only if the pensioner is resident within the territory covered by the Reichsversicherungsordnung (regardless of where the child is resident). Moreover, under Paragraph 625, subparagraph 1, of the Reichsversicherungsordnung, the supplement for a dependent child is paid to a person receiving a pension for an accident at work or for an occupational disease who resides outside the territorial scope of the Reichsversicherungsordnung only if that person has German nationality.

3. *The main proceedings and the questions referred to the Court*

The main proceedings concern ten cases brought separately against the Bundesanstalt für Arbeit (Federal Labour Office) (hereinafter referred to as 'the defendant in the main proceedings'), which the national court decided to join. The applicants in the main proceedings are nationals of, and resident in the territory of, Member States other than the Federal Republic of Germany. They are either persons who were employed in the Federal Republic of Germany or persons entitled under them.

It is apparent from the order for reference that several of the applicants in the main proceedings draw pensions under the German legislation and under the legislation of the Member State in whose territory they reside. Some of the applicants in the main proceedings receive pensions for accidents at work. One of the applicants in the main proceedings received invalidity pensions after an accident which occurred after he had taken up residence in a Member State other than the Federal Republic of Germany.

Several other applicants in the main proceedings have orphans in their care. It emerges from the order for reference that some of those orphans have a deceased parent who was subject, as an employed person, to the legislative systems a number of Member States, including the Federal Republic of Germany.

The national court also points out that some of the applicants in the main proceedings receive or, according to the defendant in the main proceedings, are entitled to receive benefits in respect of a dependent child under the legislation of the Member State in whose territory they reside.

The ten applicants in the main proceedings claim the benefits for a dependent child provided for by German legislation or a

supplement equal to the difference between the amount of those benefits and the — lower — amount of the benefits for a dependent child provided for by the legislation of the Member State in which they reside. In some cases, the benefits or the supplement to the benefits are claimed in respect of children who were born after the applicants left the Federal Republic of Germany.

The defendant in the main proceedings challenges those claims on the ground that the child allowance provided for by the Bundeskindergeldgesetz is not a benefit within the meaning of Articles 77 and 78 of Regulation No 1408/71. Moreover, it maintains that the principle that acquired rights may not be forfeited does not justify conferring rights which cannot be derived from the national laws in force. That principle cannot therefore justify the granting of the benefits claimed since the German legislation makes entitlement to those benefits subject to a residency condition which is not met in the present case. The defendant in the main proceedings also contends that Decision No 129 cannot confer rights which are not laid down either in Regulation No 1408/71 or in the national legislative systems and that, in any event, it is unable to implement the decision in question if, in particular, it is not known which institution in the Member State of residence is competent to supply official information concerning the situation of pensioners or orphans.

The national court took the view that the cases before it raised questions concerning the interpretation of Community law and, by order of 29 June 1989, stayed proceedings and referred the following questions to the Court of Justice:

'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 allowances (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?'

4. *Procedure before the Court*

The order of the Sozialgericht Nürnberg was received at the Court Registry on 8 August 1989.

In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on behalf of Nikolaos Athanasopoulos and Stamatina Defingou, represented by Hannelore Runft, assessorin jur, of the Advisory centre for returning Greek nationals, Athens; by Rosina Falcone, represented by Luciano Fazi, Welfare Secretary of the Patronato ACLI, Augsburg; by Mariano Lorenzo-Bozosa, represented by Jesus Prieto Pelaez, Head of the Welfare Department of the Spanish Consulate General, Munich; by Rosario Giganti and Agostino Palermo, represented by Jürgen Stahlberg, Rechtsanwalt, Munich; the German Government, represented by Ernst Röder and Joachim Karl, acting as Agents; by the Italian Government, represented by Pier Giorgio Ferri, Avvocato dello Stato, acting as Agent; and by the Commission of the European Communities, represented by Karen Banks, a member of its Legal Service, acting as Agent, assisted by Bernd Shulte, of the Max-Planck-Institut für Ausländisches and Internationales Sozialrecht, Munich.

Upon hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Written observations submitted to the Court

The first question

(a) Validity of the residency conditions in the German legislation

Mr Athanasopoulos and *Mrs Defingou*, applicants in the main proceedings, point out that the question whether the residency conditions are valid arises in relation to the granting not only of the child allowance provided for by the Bundeskindergeldgesetz, but also of the increase for a dependent child provided for in Paragraph 1262 of the Reichsversicherungsordnung. They point out that despite the fact that Paragraph 1321, subparagraph 3, of the Reichsversicherungsordnung contains a residency condition, on the basis of the case-law of the Court of Justice the German insurance institutions pay a benefits supplement to pensioners residing abroad when the amount of the increase in respect of a dependent child is greater than the benefits for dependent children paid under the legislation of the Member State of residence. They claim that if the residency conditions in the German legislation may be relied on against pensioners residing abroad, those pensioners might be required to reimburse the supplementary pensions unduly paid.

Moreover, Mr Athanasopoulos and Mrs Defingou ask whether entitlement to the benefits supplement in respect of a dependent child depends on the existence of entitlement to a pension, as the German insurance institutions claim, and, if so, whether the conditions laid down by the German legislation for entitlement to a pension must be met in Germany, so that any insurance periods completed in another Member State may not be taken into account. They also ask whether it is sufficient that entitlement to a pension was acquired before the transfer of residence or whether it is necessary for the pensioner to have already been receiving a pension at that time to be able to claim the benefits supplement.

Finally, they point out that, before the national court, the defendant in the main proceedings proposed paying pro-rata child allowances rather than observe the principle that the Member State of residence is competent and that, if necessary, a benefits supplement should be paid. However, they contend that that proposal is contrary to Article 77 and 78 of Regulation No 1408/71 and can be implemented only if the aforementioned regulation is amended.

Mrs Falcone, an applicant in the main proceedings, contends that the question referred by the national court has already been decided by the Court of Justice in its judgment in Case 242/83 (*Caisse de Compensation pour Allocations Familiales* v *Patteri* [1984] ECR 3171). In that case too, the national legislation provided for the payment of family allowances only in respect of children residing in the national territory and the competent institution claimed that Article 77 of Regulation No 1408/71 could not be interpreted as creating entitlement to benefits which were not provided for by any national legislation. Mrs Falcone points out that the Court nevertheless stated that a worker retains the right to the higher amount of benefits payable under the legislation of the Member State at issue where the amount of benefits

paid by the State of residence is lower. According to Mrs Falcone, it follows that the fact that the pensioner and the child do not reside in the Member State whose legislation provides for the higher amount of benefits cannot have the consequence that they are denied those benefits.

Mr Bozosa, an applicant in the main proceedings, points out first of all that under Article 77(2) of Regulation No 1408/71, benefits are granted irrespective of the Member State in whose territory the pensioner or the children are residing. Moreover, the Court has consistently held that Community rules in the field of social security cannot lead to a reduction in the benefits payable to a migrant worker or those entitled under him by virtue of the legislation of a Member State supplemented by Community law. Mr Bozosa points out that in the judgments in Cases 733/79 (*CCAF* v *Laterza* [1980] ECR 1915) and Case 242/83 (*Patteri*, cited above), entitlement to a benefits supplement was recognized on the basis of Community law in respect of children residing outside the territory of the Member State responsible for payment whose legislation conferred a right to family allowances only in respect of children residing in the national territory. It follows that it must be declared that the residency conditions in the German legislation may not be relied on against pensioners and orphans who reside in a Member State other than the Federal Republic of Germany and who claim a benefits supplement from the German institutions.

Mr Giganti and *Mr Palermo*, applicants in the main proceedings, claim first of all that it is illogical to make entitlement to the benefits supplement dependent on the absence of residency clauses in the legislation of the Member State which pays the higher amount of benefits. It is precisely because the pensioner does not reside in the territory of the Member State which pays the higher amount of benefits that he is recognized as entitled to the benefits supplement. Moreover, it is evident from the judgment of the Court in Case 733/79 *Laterza*, cited above, that the question whether a pensioner is entitled to a benefits supplement must be considered having regard to the legislation of the Member State which pays the higher amount of benefits, supplemented by Community law (doctrine of complementarity). That would mean that Article 77(2) of Regulation No 1408/71 which provides that benefits are granted irrespective of the Member State in whose territory the pensioner or the children are residing, also applies to the granting of the benefits supplement. That interpretation is confirmed by the judgments of the Court in Cases 153/84 (*Ferraioli* v *Deutsche Bundespost* [1986] ECR 1401) and Case 104/80 (*Beeck* v *Bundesanstalt für Arbeit* [1981] ECR 503) concerning the granting of a family benefits supplement to workers and unemployed persons.

According to Mr Giganti and Mr Palermo, when the Court stated that an employed person retains entitlement to the higher amount of benefits previously acquired 'under the legislation of another Member State alone' (judgment in Case 807/79 *Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205) the Court meant that when entitlement to the benefits or the amount of those benefits is conditional on the completion of periods of contribution, insurance or employment, the Member State granting the higher amount of benefits must take into account only the periods completed under its own legislation. The reference to the legislation of another

Member State 'alone' cannot therefore be intended to make it possible to rely on the residency conditions in that legislation against pensioners residing abroad.

Consequently, Mr Giganti and Mr Palermo contend that the benefits supplement must be granted by the Member State which pays the highest amount of benefits, irrespective of the Member State in whose territory the pensioner or the children are residing.

The *German Government* points out that the judgments of the Court in *Laterza* and *Patteri* lay down the principle that acquired rights may not be forfeited, according to which rights derived under national legislation may not be revoked when the person who holds them exercises his right of free movement. Consequently, a residence condition in national legislation is null and void since it penalizes the transfer of residence from one Member State to another by abolishing a right which arose before the transfer took place.

The German Government also points out that since the first sentence of Article 77(2) provides that entitlement to family benefits is acquired irrespective of residence, the rights acquired in one Member State must be retained in the event of a transfer of residence to another Member State, even if application of the law of the first Member State would give rise to a different result. Community law complements the conditions laid down by the national legislation (see the judgment in *Laterza*).

Consequently, the German Government contends that the residency condition in the Bundeskindergeldgesetz does not affect the granting of a benefits supplement if, before leaving the Federal Republic of Germany, the applicant drew a German pension or if he was in receipt of both a German pension and a pension drawn under the legislation of another Member State. That is also the position in the sphere of benefits for orphans.

The *Italian Government* contends that the principle that a worker retains the rights he acquired under the legislation of a Member State is a principle of Community law and that, consequently, the laws of the Member States may not make acquisition of the rights in question subject to conditions which are contrary to the principles on which the Treaty is based.

According to the Italian Government, national legislation which makes payment of family benefits subject to a residency condition infringes Article 7 of the Treaty because, in practice, it affects essentially migrant workers. Moreover, a national law which forces a worker to remain on the territory of a Member State in order not to lose the rights which he has acquired in that Member State infringes the principles established by Article 48(d) and Article 51(b) of the EEC Treaty in order to guarantee the free movement of workers. Furthermore, according to the Italian Government, it

follows from Article 77(2)(a) and Article 78(2)(a) of Regulation No 1408/71, that in order to determine whether a worker is entitled to family benefits under the legislation of a Member State, no account must be taken of residency conditions in that legislation.

The *Commission* sets out the case-law of the Court as it emerges from the judgments in *Laterza*, *Gravina* and *D'Amario*. It points out that the purpose of the Community rules in the field of social security is to protect workers against the disadvantages arising from the possibility of applying different social security laws when such persons exercise their right to free movement under the Treaty. According to the Commission, the effect of those rules cannot therefore be to reduce the rights which workers have acquired under the legislation of a single Member State. Consequently, the fact that Regulation No 1408/71 designates one Member State as the Member State responsible for the payment of the benefits referred to in Articles 77 and 78 does not affect the obligation of the competent institution of another Member State to pay a benefits supplement if the worker previously acquired entitlement to a pension there under the national legislation alone and if the amount of the benefits payable under that legislation is higher than the benefits payable in the first Member State.

According to the Commission, Articles 77 and 78 of Regulation No 1408/71 must therefore be interpreted as meaning that a Member State which grants a pension to a migrant worker who was previously insured in its territory, or which pays the pension to an orphan of such a worker, must pay a supplement equal to the difference between the family allowances payable under its legislation and the family allowances payable under the legislation of another Member State in whose territory the pensioner and his children, or the orphan of the deceased worker, are residing and also drawing a pension under the legislation of that State, even if, under the legislation of the first Member State, entitlement to family allowances arises only on condition that the person entitled and the qualifying child are both residing in the national territory.

(b) Child allowance for a person drawing a pension in respect of an accident at work

Mr Athanasopoulos and *Mrs Defingou* claim that the child allowance provided for by the Bundeskindergeldgesetz constitutes a social security benefit within the scope of Regulation No 1408/71. That is evident from the fact that the allowance is mentioned in the declaration made by the Federal Republic of Germany pursuant to Article 5 of Regulation No 1408/71 [1] and from the fact that the declaration in question must be accepted as proof that the benefits to which it refers are social security benefits within the meaning of Regulation No 1408/71 (see the judgments in Case 35/77 *Beerens* v

1 — Information of the Council updating the declarations of the Member States provided for in Article 5 of Council Regulation (EEC) No 1408/71 (OJ 1980 C 139, p. 1), as amended (OJ 1983 C 351, p. 1).

Rijksdienst voor Arbeidsvoorziening [1977] ECR 2249 and Case 237/87 *CRAM* v *Toia* [1979] ECR 2645). Moreover, the child allowance cannot be regarded as a benefit falling within social assistance because it is not granted on the basis of need or at the discretion of the competent body but because the conditions laid down in the Bundeskindergeldgesetz — which, in this respect, confers on all the persons entitled a legally defined status — have been met (see in particular the judgment in Case 24/74 *Caisse Regionale d'Assurance Maladie* v *Biason* [1974] ECR 999. Finally, the fact that the granting of the allowances is not conditional on the payment of contributions is of no relevance, since Article 4(2) of Regulation No 1408/71 recognizes the existence of non-contributory social security schemes.

Mrs Falcone and *Mr Bozosa* have made no observations on this point.

Mr Giganti and *Mr Palermo* contend first of all that the child allowances laid down by the Bundeskindergeldgesetz are benefits within the meaning of Article 77(1) of Regulation No 1408/71.

The benefits referred to in Article 77 include, in particular, 'family allowances'. 'Family allowances' are defined in Article 1(u)(ii) of the regulation and, according to Mr Giganti and Mr Palermo, the German child allowance corresponds to that definition. Moreover, the child allowance is mentioned in the declaration made by the Federal Republic of Germany pursuant to Article 5 of Regulation No 1408/71 as a benefit referred to in Article 77 of the regulation. That declaration has the effect of creating entitlement (see the judgment in *Beerens*, cited above), which is indisputable, particularly since the declaration was confirmed in that respect in 1983. Moreover, the fact that, under the Bundeskindergeldgesetz the granting of the child allowance is not conditional on entitlement to a pension does not justify excluding that benefit from the scope of Article 77. Article 77 concerns general 'family allowances' which Regulation No 1408/71 does not define as benefits which are conditional on a pension. That interpretation is justified by the need to ensure that a pensioner's entitlement to family allowances is not dependent on whether the national legislature decided to include the family allowance in the pension or, alternatively, to include pensioners among those entitled to benefit under the general system of family allowances.

Mr Giganti and Mr Palermo also contend that persons drawing a pension in respect of an accident at work may rely on Article 77 of Regulation No 1408/71 when they claim the child allowance. Only benefits paid in compensation for a reduction in the capacity to work caused by an accident at work or an occupational disease are excluded from the scope of Article 77. The child allowance is not such a benefit; it is a family allowance within the meaning of Article 77(1). Moreover, the declaration made by the Federal Republic of Germany pursuant to Article 5 of Regulation No 1408/71 includes it among the allowances referred to in Article 77 without making any distinction according to whether it is paid to a person drawing a pension in respect of an accident at work or a person drawing an old-age or invalidity pension.

Mr Giganti and Mr Palermo also point out that under Article 58(3) of Regulation

No 1408/71, supplements in respect of dependent children granted by virtue of insurance against accidents at work and occupational diseases must in any event be paid to the pensioner irrespective of the Member State in which he resides or in which the child resides.

The *German Government* contends that Article 77 of Regulation No 1408/71 applies to persons drawing a pension in respect of an accident at work who claim the child allowance provided for by German legislation. The exception provided for in Article 77(1), *in fine*, concerns only supplements in respect of dependent children, which must be calculated in accordance with Article 58(3) of Regulation No 1408/71.

The *Italian Government* claims that the child allowances replaced other benefits mentioned in the declaration made by the Federal Republic of Germany under Article 5 of Regulation No 1408/71. It maintains that Articles 77 and 78 of Regulation No 1408/71 concern all benefits designed to compensate family expenses and provide for the maintenance of orphans. It is not possible to abolish the rights conferred by Community law simply by changing the name of the benefits in question and the conditions on which they are granted.

The *Commission* points out that, according to the declaration by the Federal Republic of Germany pursuant to Article 5 of Regulation No 1408/71, the child allowance provided for in the Bundeskindergeldgesetz is one of the benefits referred to in Article 77. That declaration proves that the benefit at issue is a social security benefit within the meaning of Regulation No 1408/71 (see the judgment in *Beerens*, cited above). The Commission also points out that the child allowance corresponds to the definition of 'family allowances' in Article 1(u)(ii) of Regulation No 1408/71.

On the other hand, the supplements in respect of dependent children provided for in Paragraph 583 of the Reichsversicherungsordnung do not fall within the scope of Articles 77 and 78 of the regulation because they form part of the pension in respect of an accident at work. Consequently, they fall within the scope of Articles 52 to 63 of Regulation No 1408/71 relating to accidents at work and occupational diseases.

From the foregoing the Commission concludes that Article 77 of Regulation No 1408/71 is applicable to a person drawing a pension in respect of an accident at work who claims the child allowance provided for under the German legislation.

The second question

Mr Athanasopoulos and *Mrs Defingou* have not submitted any observations on this question.

Mrs Falcone refers to the judgment of the Court in *D'Amario*, cited above, in which the Court stated that 'the question whether the residence of an orphan has always been established in a Member State or whether it has been transferred there is of no relevance for the application of Articles 77 and 78 of Regulation No 1408/71' (paragraph 7). According to Mrs Falcone, it follows that

whether a person is entitled to a benefits supplement depends only on whether that person is entitled to a pension under the legislation of the Member State to which he applies, and not on his place of residence at the time he became entitled to a pension or on the date on which he became entitled to that pension.

Moreover, it emerges from the judgments of the Court in *Laterza*, *Gravina*, *Patteri*, all cited above, and in Case 1/88 (*Baldi* v *Caisse de Compensation pour Allocations Familiales* [1989] ECR 667) that the only effect of a transfer of residence from one Member State to another is to suspend entitlement to the higher amount of benefits provided for under the legislation of the first Member State up to the amount of the benefits granted by the Member State of residence. It follows that neither the date on which residence was transferred nor the date of birth of the qualifying children can have any effect on entitlement to the higher amount of benefits provided for by the legislation of a Member State.

Mr Bozosa points out that in *Laterza* the worker who claimed the higher amount of benefits provided for in the legislation of the Member State in which he was formerly resident had left the territory of that State before the birth of the children in respect of which the claim for benefits was made. He contends that if entitlement to a benefits supplement is recognized only if entitlement to the higher amount of benefits is acquired before the change of residence took place, the insured person might be prompted to change the date of his claim for a benefits supplement and the place where he makes that claim in order to obtain the highest possible amount of benefits. From that Mr Bozosa concludes that the place of residence is irrelevant for the granting of the benefits supplement provided for in Article 77(2)(b)(i) of Regulation No 1408/71.

Mr Giganti and *Mr Palermo* point out that in the sphere of family benefits, Regulation No 1408/71 confers competence on the Member State in which the person entitled has his primary source of income; with regard to pensioners, the competent Member State is the Member State responsible for paying the pension, regardless of the place of residence of the beneficiary. According to Mr Giganti and Mr Palermo, the pension creates a permanent welfare entitlement link, in the sphere of family benefits, between the pensioner and the State responsible for paying the pension, and that link is not affected by emigration. Because the link is permanent, it covers any changes in family circumstances which arise after residence has been transferred, such as the birth of a child.

Mr Giganti and Mr Palermo contend that that is the interpretation laid down by the Court in paragraph 7 of *D'Amario* and which is reflected in Paragraph 5 of Decision No 129, which provides that the benefits supplement is to be determined taking account of children or orphans in respect of whom 'rights are simultaneously acquired'.

The *German Government* claims that the principle of the protection of acquired rights can justify only retention of entitlement acquired before the change of residence. In that regard it refers to the judgment in *Laterza*, cited above. Consequently, entitlement to a benefits supplement can be acquired only if the entitlement to a pension

under the legislation of the Member State which grants the higher amount of benefits is acquired before the transfer of residence takes place. Similarly, the supplement can be granted only in respect of children born before the transfer of residence took place.

The *Italian Government* contends that the second question may be answered on the basis of general considerations concerning the establishment of entitlement to social security benefits. It claims that the principle that acquired rights may not be forfeited applies to the fulfilment of the conditions laid down by the national legislation with regard to the situation of workers (for example, conditions concerning the period of work) in so far as when those conditions are met the worker can be sure that he will be able to receive social security benefits in the event that the circumstances arise in which they must be paid.

The *Commission* refers to the first subparagraph of Article 10(1) of Regulation No 1408/71 and to the interpretation which the Court has given to that provision in its judgments in Cases 51/73 (*Sociale Verzekeringsbank* v *Smieja* [1973] ECR 1213, paragraphs 14 to 17), Case 92/81 (*Camera* v *INAMI* [1982] ECR 2213, paragraph 14) and Joined Cases 379 to 381/85 and 93/86 (*Cram Rhône-Alpes* v *Giletti* [1987] ECR 955, paragraph 17), from which it is plain that the acquirement of entitlement to the benefits, pensions and grants referred to in Article 10(1) may not be refused on the sole ground that the person concerned does not reside in the territory of the Member State responsible for payment. The Commission claims that the benefits referred to in Articles 77 and 78 are linked to pensions and that, consequently, entitlement to those benefits — and to the benefit supplement — is acquired even if the person concerned became entitled to the pension only after he transferred his residence. Similarly, the Commission contends that, since entitlement to the benefits referred to in Articles 77 and 78 arises out of entitlement to the pension, it is acquired in respect of all the children of the pensioner, including those born after the change of residence took place.

The third question

Mr Athanasopoulos and *Mrs Defingou* do not submit any observations on this question.

Mrs Falcone claims that in order to determine the amount of the benefits supplement, a comparison must be made between all the benefits provided for under the legislation of the two Member States concerned, including increases for beneficiaries on low incomes. That interpretation was laid down by the Court in paragraph 24 of its judgment in *Baldi*, cited above, and is justified by the need to ensure that no part of national welfare entitlement is not included in the coordination of such entitlement by Community legislation. Mrs Falcone adds that under Article 12 of Regulation No 1408/71 income arising abroad may be taken into consideration for determining the amount of the benefits.

Mr Bozosa claims that there is no legislative provision limiting the reduction in benefits related to the income of a recipient. He also points out that the question of how to calculate the part of the benefits related to income involves interpretation of national law and is not a matter for the Court of Justice.

Mr Giganti and *Mr Palermo* contend that Article 12(2) of Regulation No 1408/71 must be applied when determining the amount of the child allowances. The conditions for a reduction in those allowances laid down in Paragraphs 10 and 11 of the Bundeskindergeldgesetz must be regarded as rules against the overlapping of benefits in so far as they seek to prevent a recipient from making an unjustifiable gain when he receives other income intended to be used for the same purpose as the allowances, which in the present case is to maintain others. Moreover, according to Mr Giganti and Mr Palermo, those conditions may not be applied in such a way as to disadvantage a entitled person who receives income in another Member State. Therefore, that income must be taken into account as if it had been received in the national territory for the purposes of both reducing and increasing the benefits.

With regard to the fiscal exemptions laid down in Paragraph 11 of Bundeskindergeldgesetz (that is to say, the amounts deductible from total income), account should be taken only of the corresponding exemptions which the entitled person enjoys in the Member State in which the income arises, pursuant to Article 7(2) of Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (Official Journal, English Special Edition 1968 (II), p. 475).

Mr Giganti and Mr Palermo also point out that, under Article 12(2) of Regulation No 1408/71 and as stated in Paragraph 10 of Decision No 129, the rate of exchange to be applied to convert the income received and the expenses incurred in the Member State of residence into the national currency is the rate applicable in accordance with Article 107 of Regulation (EEC) No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 159), as amended.

The *German Government* claims that the question of overlapping benefits and other income is governed by Article 12(2) of Regulation No 1408/71, supplemented in the present case by Paragraphs 10 and 11 of the Bundeskindergeldgesetz.

The *Italian Government* has submitted no observations on this question.

The *Commission* points out that Article 12(2) of Regulation No 1408/71 is not applicable if, as in the present case, a benefit is subject in the Member State which grants the benefit to a reduction clause which is determined by the applicability of the fiscal provisions of the State in question.

Moreover, since Paragraphs 10 and 11 of the Bundeskindergeldgesetz can be applied only if German fiscal law is applicable, income arising abroad may not be taken into account for calculating the amount of the child allowance when the person entitled resides in a Member State other than the Federal Republic of Germany. Even though such a situation may mean that the person concerned receives an increase in the amount of the benefits granted after he transfers his residence, it is a result, according to the Commission, of the objective of the Community legislation in the field of social security, which seeks only to ensure that migrant workers are not disadvantaged when they exercise their right to freedom of movement under the Treaty.

The fourth question

Mr Athanasopoulos and *Mrs Defingou* contend that the practical difficulties arising from the grant of a benefits supplement to claimants residing in Greece are the result of structural problems affecting the Greek authorities and inherent structural weaknesses in the Greek social security system. They claim that in the absence of an express provision of Community law, those difficulties — and in particular the difficulties concerning the processing of files and the collection and evaluation of information relating to the situations of applicants — must be resolved by applying the legal principles on which the Community regulations are based (such as, according to Mr Athanasopoulos and Mrs Defingou, the principle that the migrant worker enjoys the benefit of the doubt) and the legal principles common to the Member State (such as the principle that procedural defects which are beyond the control of the worker must not have effects which are unfavourable to him; see the judgment in Case 22/86 *Rindone* v *Allgemeine Ortskrankenkasse Bad Urach-Münsingen* [1987] ECR 1339).

Mrs Falcone and *Mr Bozosa* submit no observations on this question.

Mr Giganti and *Mr Palermo* contend that the provisions of Decision No 129 concerning the procedure to be used for calculating the amount of the benefits supplement are valid. They also point out that the concept of the competent institution used in this decision may be defined more closely using Annex 2, and possibly Annex 3, of Regulation No 574/72.

The *German Government* contends that the fourth question is of no assistance in settling the dispute in the main proceedings. It points out that it has submitted a proposal for the amendment of Decision No 129.

The *Italian Government* does not make any observations on this question.

The *Commission* claims that, having regard to its answer to the third question, it is not necessary to reply to the question whether Decision No 129 is sufficient for determining entitlement to the supplement when that supplement is fixed on the basis of a child allowance the amount of which depends on the income of those concerned. It also points out that Decision No 129 is in no way binding on the national social security institutions but is intended solely to facilitate the application of Community law (see the judgment in Case 90/80 *Romano* v *INAMI* [1981] ECR 1241). The Commission also claims that the fact that the provisions of Decision No 129 are not adequate to resolve all the practical difficulties arising from the implementation of Regulation No 1408/71 cannot absolve the national institutions from their obligation under Regulation No 1408/71 to grant a benefit supplement where appropriate (see the judgment in Case 20/85 *Roviello* v *Landesversicherungsanstalt Schwaben* [1988] ECR 2805).

T. F. O'Higgins
Judge-Rapporteur