under the legislation of another Member State alone. Where the amount of the benefits actually received in the Member State of residence is less than that of the benefits provided for by the legislation of the other Member State alone the orphan is entitled to supplementary benefits, payable by the competent institution of the latter State, equal to the difference between the two amounts.

In Case 807/79

REFERENCE to the Court under Article 177 of the EEC Treaty by the Sozialgericht [Social Court] Augsburg for a preliminary ruling in the action pending before that court between

GIACOMO GRAVINA, GIUSEPPE GRAVINA, ROSA GRAVINA, CATALDO GRAVINA AND FRANCESCO GRAVINA

and

LANDESVERSICHERUNGSANSTALT [Regional Insurance Office] SCHWABEN,

on the interpretation of Article 78 (1) and (2) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT

composed of: H. Kutscher, President, A. O'Keeffe and A. Touffait (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart and T. Koopmans, Judges,

Advocate General: J.-P. Warner
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the submissions and arguments of the parties presented under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

The five plaintiffs in the main action are all legitimate children of an Italian national, Francesco Gravina, who died on 6 July 1973 in the Federal Republic of Germany. They have Italian nationality and resided for many years in the Federal Republic of Germany.

Since the deceased insured person had completed 180 weeks and 141 months of contributions in Italy and the Federal Republic of Germany respectively, on 22 March 1974 the Landesversicherungsanstalt [Regional Insurance Office] Baden granted survivors' pensions to the widow of the deceased insured person and the plaintiffs in the main action.

After the widow and the plaintiffs in the main action transferred their residence to Italy during the month of May 1974 the Landesversicherungsanstalt Baden ceased payment of the survivors' pensions at the end of the month of June 1974 and passed the file to the Landesversicherungsanstalt Schwaben — the defendant in the main action — as the appropriate liaison institution by virtue of the transfer of the file to another Member State.

The latter resumed payment of the widow's pension from 1 July 1974 but refused payment of orphans' pensions to the plaintiffs on the ground that, under Article 78 of Regulation (EEC) No 1408/71, the grant of orphans' pensions is the responsibility of the institution of the State in the territory of which the orphans reside.

The defendant in the main action rejected the objections lodged by the plaintiffs in the main action against that decision of refusal on the following grounds:

— First, all German insurance institutions, as well as the Federal Minister of Labour and Social Affairs, consider that a transfer of residence requires a fresh determination of the competent institution responsible for paying the benefits. If that interpretation were not adopted, the obligation to inform the institution responsible for payment of any transfer of residence prescribed by Article 92 of Regulation (EEC) No 574/72 (Official Journal, English Special Edition 1972 (I), p. 159) would have no meaning or sense. That view of matters is also demonstrated *a contrario* by the statement in relation to Article 78 (2) (b) (ii) contained in the Council Protocol that: "It is understood that the legislation applicable to orphans will be determined once and for all and that once the claims allowed under that legislation have been satisfied resort to any other legislation which might provide further benefits is not permitted."

— Secondly, although it is true that in its judgment of 13 July 1976 (Case 19/76 *Piero Triches* v *Caisse de Compensation pour Allocations Familiales de la Région Liégeoise* [1976] ECR 1243) the Court of Justice held that a migrant worker must not be deprived of any of the rights which he has acquired purely under the legislation of the Member State in which he has worked, it none the less added that no provision of the Treaty restricts the Council's freedom to choose any means which, viewed objectively, are justified. Thus, according to the defendant, the court has regarded as proper a change of responsibility for payment of family allowances in the event of a transfer of the residence of the beneficiary. Any hardships likely to arise are solely attributable to deficiencies in the national systems. Furthermore, "the attaching of permanent responsibility to the initially competent institution would lead to a disproportionate burdening of the host country in comparison with the country of origin".

According to information supplied to the defendant in November 1978 the plaintiffs have been paid survivors' pension retroactively by the competent Italian institution with effect from August 1973.

In their action before the Sozialgericht Augsburg the plaintiffs contend that the approach adopted by the Landesversicherungsanstalt Schwaben infringes Article 51 of the EEC Treaty and they seek an order against that body for payment of orphans' pensions from the month of June 1974 onwards, being the date at which the latter ceased its payments.

The Sozialgericht Augsburg has regard to the following considerations, namely:

(a) Since the plaintiffs are entitled to orphans' pension by virtue of the national legislation alone, the qualifying period of 60 months provided for by Article 1263 (2) of the Reichsversicherungsordnung having been fulfilled, and since that entitlement has not been suspended in accordance with Article 1315 (2) of the Reichsversicherungsordnung, it can only be suspended by virtue of Article 78 (2) of Regulation No 1408/71;

(b) The defendant's contention is questionable in that it would result in depriving a migrant worker or a survivor of a right acquired under the national legislation of a Member State — which would be incompatible with the principles of the *Petroni* judgment of 21 October 1975 (*Petroni* v *ONPTS* [1975] ECR 1149) — and it is based on the judgment in Case 19/76, cited above, which is wrongly relied upon since in that case the plaintiff in the main action did not have any entitlement to benefits under the national legislation. Furthermore, Article 78 (2) of Regulation No 1408/71 does not amount to a special prohibition against overlapping going beyond the general rules set forth in Article 12 of the said regulation;

(c) Finally, the defendant's contention leads to a problem of compatibility between Article 78 as so interpreted and the Grundgesetz [Basic Law] of the Federal Republic of Germany. In effect, the plaintiffs' right to payment may be regarded as a personal property right as against the public authorities and to deprive the plaintiffs of that right would amount to an infringement of Article 14 of the Grundgesetz. This problem, moreover, has already been raised by the Bundessozialgericht in a question submitted to the Court in the *Maggio* case.

The Sozialgericht Augsburg has accordingly submitted the following questions to the Court of Justice:

"1. In the event of the residence of orphans being transferred to another Member State does Article 78 (2) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 have the effect of enabling the competent institution of a Member State to withdraw benefits, within the meaning of Article 78 (1) of the regulation, which have already been duly awarded in that Member State if, when the benefits were awarded for the first time pursuant to Article 78 (2) of the regulation, the institution of that other Member State was the competent institution?

2. If such is the case, is withdrawal justified even where entitlement to benefits within the meaning of Article 78 (1) of Regulation No 1408/71 is conferred by national law alone?"

The order making the reference was received at the Registry of the Court on 28 November 1979. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations were submitted on 4 February 1980 by the Commission of the European Communities, represented for these purposes by its Legal Adviser, Norbert Koch, acting as Agent; on 15 February 1980 by the Landesversicherungsanstalt Schwaben, represented for these purposes by its Director, Dr Wanders, acting as Agent; on 18 February 1980 by the plaintiffs in the main action, represented for these purposes by L. Fazi, Secretary to the liaison bureau in matters of pensions of Patronato ACLI, a consultative and representative body in regard to workers' social security rights; and on 27 February 1980 by the Government of the Italian Republic, represented and assisted for these purposes by Franco Favara and Oscar Finnara, Avvocati dello Stato.

After 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 pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

A — Observations of the plaintiffs in the main action

In a preliminary observation the *plaintiffs in the main action* state that the interpretation given by the defendant to Articles 78 and 79 of Regulation No 1408/71 does not accord with the intention of the European legislature on the ground that "it would completely undermine the principle whereby insurance benefits are independent of the place of residence of those entitled". Furthermore, the solution provided for in Chapter 8 of Regulation No 1408/71 had the aim of remedying the delays which were caused by the system under Regulations (EEC) Nos 3 and 4. But in the present case the delay has been no less.

(a) First question

The plaintiffs in the main action point out that the court making the reference followed the view of the defendant and accepted the existence of entitlement to an Italian orphans' pension by virtue of Italian national law alone although no entitlement to an Italian pension is available to the orphans without aggregation and assimilation of the German and Italian contributions. Proceeding upon that premise, the question is asked

whether any transfer of residence may entail a fresh determination of the competent insurance institution. The answer to that question should be in the negative for the following reasons:

1. Such a result would be contrary to the intention of the Community legislature whose aim has been to make the determination of the amount of benefit and the ascertainment of the competent insurance institution simpler, clearer and speedier.

2. That interpretation, which involves the loss of benefits acquired under German law alone, is not in accordance with Article 51 of the EEC Treaty which guarantees the retention of entitlement to benefit acquired by the worker for himself and for his dependants. Given that the Court has already recognized (see judgment of 13 July 1976 in Case 19/76, cited above) that Regulation No 1408/71 must not have the result of depriving the migrant worker of any right which he has acquired under the legislation of the Member State in which he has worked and given that, were the defendant's interpretation to be followed, Article 78 would permit of a restriction upon the rights guaranteed by Article 51 and would amount to a fresh restriction upon rights other than those provided for in Article 12 of the said regulation, the said Article 78 would be contrary to the Treaty.

3. The European legislature has decided that the entitlement to benefit and the competent insurance institution should be determined once and for all on the materialization of the risk. Only that objective can give meaning to the first sentence of Article 78 (2) which states that "Orphans' benefits shall be granted ... irrespective of the Member State in whose territory the orphan ... is resident". That is confirmed by the Council Protocol on Article 78 (2) (b) (ii) which — giving an official interpretation of the regulation — provides that the determination of the competent institution is made once and for all. It is also confirmed by the provision at the end of Article 78 which stipulates that in regard to orphans of an insured person already in receipt of a pension, the legislation of the Member State in which the insured person resided remains applicable after the death of the said pensioner. It is not logical to draw a distinction between the orphans of an insured person who was already entitled to a pension and the orphans of an insured person who was not yet in receipt of a pension.

4. Only the continued payment of accrued benefits is such as to ensure a balance in the financial burdens to be borne by the Member States. It is, indeed, more common for the children of workers to remain in their country of origin or to return there after the death of their father, so it is only exceptionally that the country of immigration is responsible for orphans and it does not accord with the spirit of Regulation No 1408/71, which provides for the maintenance of a balance between Member States, to place responsibility on a single Member State.

5. Orphans must be guaranteed, if possible, a standard of living equivalent to that with which the deceased worker provided them. It is that guarantee which the Community legislature had in mind in providing that orphans' benefits must be granted in accordance with the legislation of the State to which the deceased worker had been subject for the longest period (Article 78 (2) (b) (ii)).

6. Finally, under German legislation, an administrative act must be regarded as binding after the expiry of the time-limit for an appeal "unless there has been material change in the facts or the basis upon which the decision was taken". If a transfer of residence were to be sufficient to entail the rescission of a binding decision, the aim of Article 51 of the Treaty would not be entirely achieved.

Accordingly, the plaintiffs in the main action suggest that the Court should answer the first question thus:

"The insurance institution of the Member State which is competent to grant orphans' pension is determined once and for all, in accordance with Article 78, on the death of the insured person. A transfer of the orphans' residence within the European Community may not have the effect of permitting the withdrawal of benefits which have already effectively accrued."

(b) Second question

It is not disputed that the plaintiffs' right to benefits exists by virtue of German legislation and it is only for nationals of a Member State of the Community that that right is not recognized, while under the existing case-law of the Court orphans are entitled to the grant of orphans' pension independently of their place of residence. Thus in Case 24/75, cited above, the Court held that the aim of Articles 48 to 51 would not be attained if, as a consequence of the exercise of the right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the laws of a single Member State. Thus also in its judgment of 20 November 1975 in Case 49/75, *Borella* v *Landesversicherungsanstalt Schwaben* [1975] ECR 1461, the Court ruled that Article 48 (1) of Regulation No 1408/71 — which permits a Member State in certain circumstances not to pay benefits — cannot be applied where the right to benefits arises solely from the provisions of the legislation of the Member State in question. The plaintiffs consider that the thinking underlying that judgment may serve as a guiding principle for orphans' pensions.

The defendant is also bound to award the plaintiffs in the main action orphans' pension on the ground that they are entitled thereto under Article 1315 (2) of the Reichsversicherungsordnung, although they do not possess German nationality and although they reside abroad, provided that the person entitled to their guardianship also resides abroad. In the present case the widow, who is the person entitled to their guardianship, decided to return to Italy.

Not to grant the plaintiffs that right would be equivalent to treating a Community citizen less favourably than other foreigners and would constitute, furthermore, an infringement of Article 3 of the Grundgesetz of the Federal Republic of Germany.

Accordingly, the Court should answer the second question as follows:

"Where entitlement to benefits within the meaning of Article 78 of Regulation (EEC) No 1408/71 is conferred by the legislation of a Member State, Article 78 does not have the effect that a stay in another Member State may entail the extinction, withdrawal, reduction or suspension of the entitlement to that benefit."

B — Observations of the Italian Government

According to the *Italian Government*, benefits which have been awarded may not be modified, suspended or withdrawn in any circumstances. The suspension of benefits by the Landesversicherungsanstalt Schwaben constitutes an infringement of Article 78 (2) of Regulation No 1408/71 which does not provide for any ground of suspension or loss of benefits. That right "is even more strongly guaranteed" than that recognized by Article 79 of the said regulation. In Case 100/78, *Rossi* v *Caisse de Compensation pour Allocations Familiales* [1979] ECR 831, the Court held that Article 79 (3), "designed to prevent the overlapping of family allowances, is applicable only to the extent to which it does not, without cause, deprive the persons concerned of the benefit of a part of the legislation of a Member State".

The principle which prohibits a fresh award of benefits follows from the statement contained in the Council Protocol of 14 June 1971, although that statement expressly concerns only Article 78 (2) (b) (ii).

The interpretation given by the Landesversicherungsanstalt Schwaben would result, moreover, in a difference of treatment between an orphan who has remained in a Member State and one who has transferred his residence to another Member State. That discrimination is even more unwarranted since during his lifetime the deceased worker contributed, by paying contributions, to the accumulation of the resources necessary for the payment of pensions to his survivors.

Furthermore, Article 51 of the EEC Treaty has laid down the principle of the "conservation" of the right to benefits in the event of the removal of workers and their dependants between countries. In the present case the plaintiffs in the main action would have been entitled to orphans' pensions by remaining in the Federal Republic of Germany (see the judgment of 16 March 1978 in Case 115/77 *Laumann* v *Landesversicherungsanstalt Rheinprovinz* [1978] ECR 805). Accordingly, "that principle of the irrelevance of the place of residence of the recipient of insurance benefits would be breached if a transfer of residence had the effect of suspending or withdrawing the entitlement to benefit".

Finally, the Italian Government submits that — since it contains only provisions against overlapping — the said Article 78 may not adversely affect the treatment afforded to the plaintiffs by German legislation and must be interpreted as meaning that the recipients have the right to retain the treatment which is most favourable to them, which proposition follows from the judgment in Case 100/78, cited above.

In conclusion, the Italian Government suggests that both of the questions put should be answered in the negative.

C — Observations of the Landesversicherungsanstalt Schwaben

(a) First question

The *defendant in the main action* states at the outset that, in its opinion, the question submitted is "clearly and exhaustively" governed by the provisions of Article 78 (2) and that the decisions of both the Landesversicherungsanstalt Baden and the Landesversicherungsanstalt Schwaben are in accordance with the administration practice of all the Member States, including Italy.

The contention of the plaintiffs in the main action is not well founded since it has the result of enabling the plaintiffs to

aggregate the German and Italian pensions, given that Article 78 (2) (b) (ii) does not provide for the exclusion of benefits which the competent institution in the new place of residence must provide. Accordingly, the contentions of the plaintiffs in the main action run counter to the wording of Article 78 (2).

That interpretation is also contrary to the intention of the Community legislature, such as that intention appears from the history of the regulation in question. Regulations Nos 3 and 4, under which each competent institution concerned in a Member State was bound to pay a part of an orphan's pension, did not do justice to "the social policy objective of orphans' pensions as a substitute means of maintenance" and when they produced unjust results a new system was adopted "which, as a general rule, is based on the situation in the State of residence". It is thus the institution in the place of residence which is bound to pay orphans' pensions, taking into account insurance periods completed in other Member States.

Furthermore, the plaintiffs' interpretation may not be founded on the statement contained in the Council Protocol relating to Regulation No 1408/71 either, for that statement only makes sense in relation to subparagraph (ii) and expressly refers to that subparagraph and not subparagraph (i) which is the relevant provision in the present case. The absence of any corresponding statement relating to subparagraph (i) points in favour of the argument that, in accordance with the intention of the Community legislature, there is meant to be a transfer of responsibility where the residence of the orphans is transferred.

The defendant stresses that this argument was also disputed by the Italian institutions in regard to family allowances. But the Court of Justice, in answer to the questions submitted in Case 19/76, cited above, stated that, although a migrant worker must not be deprived of a right acquired by virtue only of the legislation of the Member State in which he has worked, no provisions of the Treaty restrict the freedom conferred on the Council to choose any means which are justified, and it regarded as lawful a transfer of responsibility for family allowances in the event of a transfer of the residence of the recipient. The same solution ought to apply to orphans' pensions.

The defendant adds that its interpretation of the rules may also bring advantages for recipients of benefits who transfer their residence, for example from Italy to the Federal Republic of Germany, whereas, in such a case, according to the plaintiffs' argument, the recipients of benefits may only receive Italian pensions, which are lower in value than the German benefits. Finally, the plaintiffs' argument would result in unfair overlapping in the case where a worker who has worked for 15 years in Italy dies after one year of employment in the Federal Republic of Germany. In fact, at that moment in time, the dependants would benefit from a pension paid in the Federal Republic of Germany on the total of the periods of employment completed and such pension, according to the plaintiffs, would be owed to them in its entirety, even in the event of a transfer of their residence to Italy; however, in such a case they also retain an Italian entitlement on the basis of the insurance periods completed in Italy.

(b) Second question

The Landesversicherungsanstalt Schwaben stresses at the outset that, in its view, orphans' pensions must be awarded pursuant to Chapter 8 of Regulation No 1408/71 and not pursuant to Chapter 3. Articles 78 and 79 introduced a single "total benefit", unlike Article 46 (1) which distinguishes between national benefits and "proportional benefits" (Verhältnisrenten). Accordingly, it matters little to establish whether a national entitlement exists. That system is justified by the fact that, as distinct from other pensions, the grant of orphans' pensions is subject to very different rules in the various Member States.

Finally, the defendant submits that its interpretation of Article 78 does not constitute an unlawful restriction on freedom of movement and does not offend against the principles laid down by the Court of Justice in regard to Article 51 of the EEC Treaty. The rules as to responsibility for payment in the event of a transfer of residence of orphans must be considered in the context of the rules as a whole, which guarantee payment of a pension to orphans in every case. In that regard the defendant reminds the Court that the reverse case — the transfer of the residence of orphans from Italy to the Federal Republic of Germany — would have demonstrated the questionable character of the plaintiffs' interpretation.

Consequently, the defendant suggests that an affirmative answer should be given to the two questions submitted.

D — Observations of the Commission

1. The interpretation of Article 78 (2) of Regulation No 1408/71

According to the *Commission,* Article 78 stipulates that entitlement to orphans' benefits is to be determined in accordance with the legislation of a single Member State and where the deceased worker has been subject to the legislation of two or more Member States the decisive test for determining the law applicable is the residence of the orphans.

As the plaintiffs in the main action are entitled to benefits in Italy and in the Federal Republic of Germany the rules for determining which legislation applies are the following:

"If the plaintiffs reside in the Federal Republic, orphans' pension is provided in accordance with German legislation;

If the plaintiffs reside in Italy, orphans' pension is provided in accordance with Italian legislation;

If the plaintiffs reside in a Member State other than the Federal Republic of Germany or Italy, orphans' pension is provided in accordance with the German legislation".

That effect of Article 78 is intentional and is confirmed by Article 92 of Regulation No 574/72, according to which any transfer of residence of orphans must be notified to the institution responsible for payment. Accordingly, the legislation applicable pursuant to Article 78 is not determined once and for all. That applies even in the case of a transfer of residence to a Member State the legislation of which does not provide any entitlement to benefit.

2. The calculation of the benefit

Once the applicable legislation has been determined in accordance with Article 78, then, in pursuance of Article 79, the competent institution shall provide benefits "at its expense as if ... the deceased worker had been subject only to the legislation of the competent State". Thus, so long as the orphans

were resident in the Federal Republic of Germany, the Landesversicherungsanstalt Baden had to pay benefits on the basis of the Italian and German entitlement without any opportunity of obtaining a reimbursement from the Italian institution; but as from the time when the orphans became resident in Italy it was for the Italian institution to pay to them the total amount of benefits.

3. The compatibility of Article 78 (2) of Regulation No 1408/71 with Article 51 of the Treaty

The Commission recalls at the outset that "Article 78 co-ordinates the systems of the Member States in the sense that the institution of one of the competent Member States provides the benefits at its expense and in accordance with its own legislation for all the periods of insurance completed". That solution is perhaps not the fairest but it appears to be the most simple, flexible and speedy and at the same time it does not prejudice the migrant worker since benefits are calculated on the total of the insurance periods completed.

The compatibility of that solution with Article 51 of the EEC Treaty was recognized by the Court in its judgment in Case 19/76, *Triches,* cited above.

Finally, although it is correct that the entitlement of the plaintiffs in the main action exists by virtue of the German legislation alone, the "withdrawal" of those rights following upon the transfer of the plaintiffs' residence to Italy "must not be regarded as an impermissible curtailment of entitlement to benefit acquired in a Member State by virtue of the legislation of that State alone", which would then be comparable to the restriction on overlapping provided for in Article 46 (3) of the regulation, which restriction has been declared to be incompatible with Article 51 of the EEC Treaty. And the Commission reiterates that Article 78 does not entail a prohibition on overlapping but constitutes a conflict rule determining the applicable law, which obliges the competent institution to provide benefits corresponding to the insurance periods completed in other Member States. The scheme of Article 78 "must therefore be regarded as a whole from which partial entitlement by virtue of the legislation of a single Member State may not be dissociated".

4. The compatibility of Article 78 (2) of Regulation No 1408/71 with Article 14 of the Grundgesetz

In the Commission's view, the Community provisions may not be tested according to their compatibility with the fundamental rights guaranteed by the Grundgesetz. Community law constitutes an independent legal order provided with a system for protecting its own rights. The case-law of the Court has stressed that the observance of fundamental rights forms part of the principles of law the observance of which the Court must ensure (see the judgments of 17 December 1970 in Case 11/70 *Internationale Handelsgesellschaft* v *Einfuhr- und Vorratsstelle für Getreide und Futtermittel,* [1970] ECR 1125; of 14 May 1974 in Case 4/73 *Nold* v *Commission of the European Communities* [1974] ECR 491; and of 12 December 1979 in Case 44/79 *Hauer* v *Land Rheinland-Pfalz* [1979] ECR).

Accordingly, it is of little consequence whether the right to an orphans' pension is in the nature of a property right. The loss of that right is compensated by the recognition of a corresponding right as against another institution. And if the

result of that is "a deterioration in the position of the person entitled, that deterioration must be regarded as a restriction which is necessary in the interest of freedom of movement for workers".

In conclusion, the Commission suggests that the questions submitted should be answered thus:

"1. Where a deceased worker has been subject to the legislation of several Member States, orphans' benefits within the meaning of Article 78 (1) of Regulation No 1408/71 are provided, pursuant to paragraph (2) (b) (i) of that article, in accordance with the legislation of the State in the territory of which the orphans reside, provided that entitlement to those benefits exists there by virtue of the legislation of that State, regard being had, where appropriate, to the provisions of Article 79 (1) (a) of the regulation. Where the orphans transfer their residence to another Member State following the award of benefits an alteration in the legislation applicable by virtue of Articles 78 (2) (b) may result therefrom.

2. The legal consequences of Article 78 (2) (b) (i) arise in the event of a transfer of residence to the territory of another Member State, even where an entitlement to benefits within the meaning of Article 78 (1) of Regulation No 1408/71 existed by virtue only of the legislation of the Member State on the territory of which the orphans resided before transferring their residence".

III — Oral procedure

At the sitting on 21 May 1980 the Commission of the European Communities, represented by Dr N. Koch, acting as Agent, the plaintiffs in the main action, represented by L. Fazzi and L. Nicolussi of the Patronato ACLI, and the defendant in the main action, represented by the Director of the Landesversicherungsanstalt Schwaben, Dr Wanders, presented oral argument and answered questions from the Court.

The Advocate General delivered his opinion at the sitting on 10 June 1980.

Decision

1 By order of 25 October 1979, which was received at the Court on 28 November 1979, the Sozialgericht Augsburg referred to the Court for a preliminary ruling two questions on the interpretation of Article 78 (2) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

2 Those questions have been put in the context of a dispute between the legitimate children of an Italian national, who died on 6 July 1973 in the Federal Republic of Germany where he had completed 141 months of contributions under the German invalidity and old-age insurance schemes after previously completing 42 months under the Italian scheme, and the competent German institution which, on the mother's transferring the family residence to Italy in May 1974, ceased to pay them the orphan's pensions which they had been awarded under German law alone and which had been paid to them in the Federal Republic of Germany whilst they were still resident there after their father's death.

The institution, the defendant in the main action, refused to continue to pay the said pensions once they had left to reside in Italy on the ground that under Article 78 of Regulation No 1408/71 the granting of such pensions was the responsibility of the institution of the State in whose territory the orphans reside.

3 The said article, as amended by Regulation (EEC) No 2864/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (31 December), p. 15 (original reference L 306, p. 1) provides that the said pension shall be granted . . .

"(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 to in paragraph (1) is acquired under the legislation of that State . . .".

4 In view of this provision and the facts of the case — involving a refusal to continue payment to orphans who have transferred their residence to a Member State where they are in a position to enjoy other benefits of the same kind — the Sozialgericht Augsburg referred to the Court the following questions:

"1. In the event of the residence of orphans being transferred to another Member State does Article 78 (2) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 have the effect of enabling the competent institution of a Member State to withdraw benefits, within the meaning of Article 78 (1) of the regulation, which have already been duly

awarded in that Member State if, when the benefits were awarded for the first time pursuant to Article 78 (2) of the regulation, the institution of that other Member State was the competent institution?

2. If such is the case, is withdrawal justified even where entitlement to benefits within the meaning of Article 78 (1) of Regulation No 1408/71 is conferred by national law alone?"

5 Those two questions together raise the issue, in regard to Article 78 (2) (b) (i), of the effect of a transfer of residence from one Member State to another of orphans who are in receipt of benefits derived from a deceased worker who was subject to the legislation of the two Member States of residence.

6 In order to settle the issue, it is important to place the provision of which the interpretation is sought in the context of Article 51 of the Treaty which requires the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. The aim of Article 51 would not be achieved if, as a result of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed to them, in any event, by the legislation of a single Member State.

7 The regulations on social security for migrant workers did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by Community law relating, in particular, to the lifting of conditions of residence. In its judgment of 6 March 1979 in Case 100/78 *Rossi* v *Caisse de Compensation pour Allocations Familiales* [1979] ECR 831 the Court stated, moreover, that "the Community rules could not, in the absence of an express exception consistent with the aims of the Treaty, be applied in such a way as to deprive a migrant worker or his dependants of the benefit of a part of the legislation of a Member State". Nor may those rules bring about a reduction in the benefits awarded by virtue of that legislation. Regulation No 1408/71, in laying down rules

for the co-ordination of the various national laws, is inspired in fact by the fundamental principle that the said rules must guarantee workers moving within the Community the entirety of benefits acquired in the different Member States up to the limit of the greatest amount of those benefits.

8 In accordance with those principles, therefore, the provisions of Article 78 (2) of Regulation No 1408/71 may not be interpreted in such a way that, by the substitution of benefits provided by the new State of residence for the benefits previously acquired under the legislation of another Member State alone, the orphans of a deceased worker who was subject to the legislation of more than one Member State are prevented from receiving the greatest amount of those benefits. Where, therefore, the residence of the orphans is transferred to the territory of a Member State where an entitlement to benefits is acquired by them under the legislation of that State, it is necessary to compare the amount of the benefits actually received with the actual amount of the benefits which they would have continued to receive in the other Member State and, if the amount of the new benefits is less than that of the benefits previously acquired, to acknowledge the orphans to be entitled, as against the competent institution of the other Member State where the entitlement to the greater amount was acquired, to supplementary benefits equal to the difference between the two amounts.

9 That answer allows the issue raised by the two questions submitted by the Sozialgericht Augsburg to be resolved.

Costs

10 The costs incurred by the Commission of the European Communities and the Italian Government, which have submitted observations to the Court, are not recoverable. Since these proceedings are, in so far as the parties to the main action are concerned, in the nature of 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 Sozialgericht Augsburg by order of 25 October 1979, hereby rules:

Article 78 (2) (b) (i) of Regulation No 1408/71 of the Council of 14 June 1971 must be interpreted as meaning that the entitlement to benefits payable by the State in whose territory the orphan to whom they have been awarded resides does not remove the entitlement to benefits greater in amount previously acquired under the legislation of another Member State alone. Where the amount of the benefits actually received in the Member State of residence is less than that of the benefits provided for by the legislation of the other Member State alone the orphan is entitled to supplementary benefits, payable by the competent institution of the latter State, equal to the difference between the two amounts.

Kutscher O'Keeffe Touffait

Mertens de Wilmars Pescatore Mackenzie Stuart Koopmans

Delivered in open court in Luxembourg on 9 July 1980.

A. Van Houtte
Registrar

H. Kutscher
President