OPINION OF ADVOCATE GENERAL GEELHOED

delivered on 28 September 2006 [1]

I — Introduction

1. Under the German Bundeserziehungsgeldgesetz (Federal Law on child-raising allowance, hereinafter 'the BErzGG'), the grant of child-raising allowance is dependent, inter alia, on the beneficiary being resident in Germany. In this case, the Bundessozialgericht (Federal Social Court) asks the Court whether this residence requirement is incompatible with Community law, more particularly Regulation No 1612/68, [2] Regulation No 1408/71 [3] or Article 18 EC, so that an Austrian woman living in Austria together with her German husband who is employed in Germany as a civil servant should also be able to claim entitlement to this allowance.

2. In parallel with this case, the Bundessozialgericht referred a further question to the Court on the same provision of national law governing entitlement to child-raising allowance, this time in relation to a frontier worker living in the Netherlands and working in Germany: Case C-213/05 *Geven*. According to the provision concerned, frontier workers may also claim entitlement to this benefit provided they are engaged in more than minor employment in Germany. Although both cases are closely linked, the factual circumstances from which they arose are completely different, so that I will discuss each case in a separate Opinion which will be presented together with this Opinion.

1 — Original language: English.

2 — Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community (hereinafter: Regulation No 1612/68), (OJ, English Special Edition 1968(II) p. 475).

3 — Council Regulation (EC) 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, OJ 1971 L 149, p. 2, as amended by Regulation No 3095/95, of 22nd December 1995 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, Regulation (EEC) No 574/72 fixing the procedure for implementing Regulation (EEC) No 1408/71, Regulation (EEC) No 1247/92 amending Regulation (EEC) No 1408/71 and Regulation (EEC) No 1945/93 amending Regulation (EEC) No 1247/92, OJ 1995 L 335, p. 1, and by Regulation No 3096/95, of 22 December 1995 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, OJ 1995 L 335, p 10, (hereinafter 'Regulation No 1408/71').

II — Relevant provisions

A — *Community law*

3. Article 7(1) and (2) of Regulation (EEC) No 1612/68 provide as follows:

'1. A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work, in particular as regards remuneration, dismissal, and should he become unemployed, reinstatement or re-employment;

2. He shall enjoy the same social and tax advantages as national workers.'

B — *National law*

4. Under Paragraph 1(1) of the BErzGG, in the version of 31 January 1994, [4] any person who is (1) permanently or ordinarily resident in Germany, (2) has a dependent child in his household, (3) looks after and brings up that child, and (4) has no, or no full-time, employment, is entitled to child-raising allowance.

5. Paragraph 1(4) of the BErzGG provides for an entitlement for EC citizens and frontier workers from Germany's immediate neighbouring countries provided they are engaged in more than minor employment in Germany. It appears from the order for reference that this provision does not apply to civil servants or to the spouses of migrant workers.

6. Paragraph 1(7) of the BErzGG, in the version of 12 October 2000, [5] extends entitlement of the child-raising allowance to the spouse of a person in a public-law employment or civil service relationship in Germany who lives in another EC Member State. However this provision is not applicable to children born before 1 January 2001.

4 — BGBl. I, p. 180.

5 — BGBl. I, p. 1426.

III — Facts and procedure

7. The dispute in the main proceedings before the Bundessozialgericht, concerns the refusal by the Freistaat Bayern to grant Mrs Hartmann child-raising allowance for her three children, born in 1991, 1993 and 1997.

8. Mrs Hartmann is an Austrian national who lives in Austria together with her German husband and her three children. Before his marriage, Mr Hartmann lived in Germany where he was employed since 1986 as a civil servant with the Deutsche Bundespost. After his marriage in May 1990 Mr Hartmann moved to Austria, but continued to work for Deutsche Bundespost and later, as from 1995, for Deutsche Telekom AG. Mrs Hartmann does not perform any activity in employment or self-employment.

9. The Freistaat Bayern refused to grant Mrs Hartmann the child-raising allowance for her first two children under the BErzGG, because she did not live in Germany and did not have an employment relationship in that country either. Applications for review made by Mrs Hartmann in October 1996 were unsuccessful, as was her application for child-raising allowance for the first year of her third child's life.

10. Mrs Hartmann challenged these decisions in vain, first, before the Sozialgericht München (Social Court, Munich) and later, on appeal, before the Bayerisches Landessozialgericht (Bavarian Higher Social Court). She thereupon appealed to the Bundessozialgericht, which decided to stay the proceedings and refer two questions to the Court of Justice for a preliminary ruling under Article 234 EC.

11. In its order for reference the Bundessozialgericht first established that Mrs Hartmann could not claim the child-raising allowance under Regulation No 1408/71. Although this benefit comes within the scope ratione materiae of this regulation and she could as such have claimed entitlement to it under the case-law of the Court (*Hoever and Zachow*),[6] as a civil servant Mr Hartmann was not at the material time an 'employed person' within the meaning of the regulation and fell outside its scope ratione personae. The national court went on to consider whether her entitlement could be based on Article 7(2) of Regulation No 1612/68. It found that Mr Hartmann's status as a civil servant did not prevent him from being regarded as a worker, but it doubted whether the rights granted by this regulation could be invoked by the spouse of a person who, without changing his employment relationship, had moved to live in another Member State of which the spouse is a national. It pointed out that thus far the Court has

6 — Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* [1996] ECR I-4895.

considered the primary aim of Article 39 EC and Regulation No 1612/68 to be to enable a worker to move freely into the territory of the other Member States and to stay there for the purpose of employment. [7] However, it also opined that perhaps a less narrow interpretation of freedom of movement might now be possible, as a general right of stay has been recognised in Article 18 EC. These considerations led the Bundessozialgericht to referring the following two questions to the Court:

'(1) Is a German national who, while continuing his employment relationship as a post office official in Germany, moved his permanent residence from Germany to Austria in 1990 and has since then carried on his occupation as a frontier worker to be regarded as a migrant worker within the meaning of Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community ... for periods between January 1994 and September 1998?

If so:

(2) Does it constitute indirect discrimination within the meaning of Article 7(2) of Regulation No 1612/68 if the non-working spouse of the person mentioned in (a), who lives in Austria and is an Austrian national, was excluded from receiving German child-raising allowance in the period in question because she did not have either her permanent residence or her habitual place of stay in Germany?'

12. Written observations were submitted by Mrs Hartmann, the German, Spanish and United Kingdom Governments and the Commission. At the hearing on 13 June 2006 further observations were made by Mrs Hartmann, the German, Netherlands and United Kingdom Governments and the Commission.

IV — Summary of submissions

13. Both Mrs Hartmann and the Spanish Government submit that the first question concerning Mr Hartmann's status as a migrant worker within the meaning of Regulation No 1612/68 should be answered in the affirmative. The Spanish Government refers in this regard to Article 1(1) of Regulation No 1612/68 according to which

7 — The Bundessozialgericht referred in this regard to Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171, at paragraph 21.

'[a]ny national of a Member State, shall, irrespective of his place of residence, have the right to take up an activity as an employed person, and to pursue such activity, within the territory of another Member State ...' and points out that under Article 10 of this regulation the benefits afforded to migrant workers also extend to the spouse of these workers. [8] It also observes that Mr Hartmann should be considered as a frontier worker within the meaning of Article 1(b) of Regulation No 1408/71. [9] Both these parties consider that even though it may be objected that Mr Hartmann is a civil servant and that civil servants were only brought within the ambit of Regulation No 1408/71 in respect of the granting of family benefits in 1999, [10] in parallel with the scope ratione personae of Article 39(4) EC, this restriction should only be regarded as applying to those civil servants who are involved in the exercise of public authority. However, Deutsche Telekom AG, is an undertaking which provides public utility services and does not perform tasks connected with the exercise of public authority.

14. As to the second question, Mrs Hartmann and the Spanish Government assert that the refusal to grant Mrs Hartmann the child-raising allowance constitutes indirect discrimination in breach of Article 7(2) of Regulation No 1612/68 and Article 39 EC. Where the national courts found that the exportability of benefits depends on the existence of an employment relationship, the Spanish Government ,relying on *Hoever and Zachow*, [11] observes that the fact which triggers eligibility for family benefits such as the child-raising allowance is that either of the parents decides to devote himself or herself to raising the child, irrespective of whether that parent is insured under a social security scheme or is employed. In the present case, Mrs Hartmann's husband establishes her link to the social security scheme in Germany.

15. The German and United Kingdom Governments consider that a person who has not exercised his right of free movement with a view to taking up employment in another Member State, but has merely changed his country of residence, cannot be considered to be a migrant worker within the meaning of Regulation No 1612/68. In the alternative, as regards the second question, these governments point out, that although it has been established that the child-raising benefit concerned falls within the scope ratione materiae of Regulation No 1408/71, as a civil servant, Mr Hartmann was not at the material time covered by this regulation ratione personae as regards the granting of family benefits. Unlike Regulation No 1408/71, Regulation No 1612/68 does not provide for the exportability of social

8 — Reference is made to Case 316/85 *Lebon* [1987] ECR 2811 and Case C-3/90 *Bernini* [1992] ECR I-1071.

9 — 'Frontier worker means any employed or self-employed person who pursues his occupation in the territory of a Member State and resides in the territory of another Member State to which he returns as a rule daily or at least once a week.'

10 — Council Regulation (EC) No 1399/1999 of 29 April 1999 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, OJ 1999 L 164, p. 1 (hereinafter: Regulation No 1399/1999).

11 — Cited in footnote 6.

benefits or for the prevention of overlapping benefits. As the former must be regarded as a *lex specialis* in respect of the latter or, in the words of the United Kingdom Government, takes relative precedence over the latter, Article 7(2) of Regulation No 1612/68 must not be interpreted in such a way as to undermine the effectiveness of the system laid down in Regulation No 1408/71. The German Government recognises that the residence requirement in the BErzGG may constitute indirect discrimination, but considers that it is justified in order to ensure that there is an effective link between the beneficiary and German society. The United Kingdom Government maintains that Member States should not be forced to provide objective justification for not making advantages such as the child-raising allowance available to persons resident in other Member States.

16. The Commission agrees with the German and United Kingdom Governments that Regulation No 1612/68 and Regulation No 1408/71 do not apply to the case in hand for the same reasons given by them. However, in view of the Bundessozialgericht's observation in its order for reference that the notion of freedom of movement guaranteed by Regulation No 1612/68 might be given a wider interpretation now that Article 18 EC provides for the right to move and stay in other Member States independent of any economic purpose, the Commission considers that the Court should also address the question as to whether Mrs Hartmann might be able to derive a right to German child-raising allowance from this provision.

17. On this question, referring to the general principles on citizenship summarised by the Court in *Pusa*, [12] the Commission points out that national legislation which disadvantages certain of its nationals simply because they have exercised their freedom to move to and to reside in another Member State would give rise to inequality of treatment which can only be deemed compatible with Article 18 EC if it can be justified on the basis of objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions. Where it is apparent that application of the residence requirement in the BErzGG does constitute such a disadvantage, the Commission shares the doubts expressed by the Bundessozialgericht as to its justification. It finds confirmation for this in the fact that in the meantime the BErzGG has been amended in order to permit child-raising allowance to be paid to spouses of German civil servants resident in other Member States. According to the Commission, with reference to the Court's judgment in *Bidar*, [13] it is not necessary, 'for obvious

12 — Case C-224/02 *Pusa* [2004] ECR I-5763. See paragraphs 16 to 20 of the judgment.

13 — Case C-209/03 *Bidar* [2005] ECR I-2119. See paragraphs 55 to 62 of the judgment.

reasons', to consider whether Mr Hartmann, as a civil servant working in his home country, is sufficiently integrated into or has a real link with German society.

18. At the hearing the German and United Kingdom Governments emphasised that it is Mrs Hartmann and not Mr Hartmann who is claiming entitlement to child-raising allowance under the BErzGG. As Mrs Hartmann has not herself exercised the rights guaranteed by Article 18 EC, there is no basis for her invoking this provision. In this respect her case must be distinguished from that of for example *D'Hoop* [14] and *Pusa.* [15] Article 18 EC cannot be interpreted in such a way as to permit a person who has not moved to another Member State to invoke the rights of his or her spouse who has exercised the right to move. The rights guaranteed by Article 18 EC are subject to limitations. Such limitations are to be found in Regulation No 1408/71 as regards the exportability of social security benefits.

19. In response to the Commission's position on the applicability of Article 18 EC, the Netherlands Government observes that although there is a certain similarity in the factual circumstances between the present case and *Schempp,* [16] in contrast with that case the exercise by Mr Hartmann of his right to move to another Member State did not in any way affect Mrs Hartmann's entitlement to benefits in Germany. It was immaterial in that regard whether Mr Hartmann lived in Germany or in Austria. Pointing out that, in this case, it is the spouse of the migrant citizen who seeks to assert rights in respect of the latter's country of origin, the Netherlands Government states that, as it stands, Community law only recognises certain derived rights for family members of migrant citizens in the host Member State. [17] Mrs Hartmann cannot claim entitlement to child-raising allowance under Article 18 EC simply because she has not herself exercised her right to move. Mr Hartmann was not prevented from exercising his right to move to Austria in any way.

V — Assessment

A — *Introductory remarks*

20. First, it should be emphasised that Mrs Hartmann cannot invoke Community law

14 — Case C-224/98 *D'Hoop* [2002] ECR I-6191.

15 — Cited in footnote 12.

16 — Case C-403/03 *Schempp* [2005] ECR I-6421.

17 — Reference was made to Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC, OJ 2004 L 158, p. 77.

independently in order to challenge the decisions by which her applications for child-raising allowance were refused as she has not made use of her rights of free movement under Community law. The only way in which she can access this benefit is indirectly through her marital bond to Mr Hartmann, who incidentally himself does not fulfil the conditions laid down in Paragraph 1(1) of the BErzGG.

21. The questions referred by the Bundessozialgericht therefore focus on Mr Hartmann's possible status as a migrant worker and the consequences this may have for Mrs Hartmann's entitlement to German child-raising benefit. Does the fact that Mr Hartmann moved to Austria to reside there with his wife and children whilst retaining his job in Germany mean that he now must be considered to be a migrant worker falling within the scope of Regulation No 1612/68, thus creating a right, through the combined effect of Articles 7(2) and 10(1)(a) of that regulation, for Mrs Hartmann to claim equal treatment in respect of social advantages in the Member State where her husband is employed, i.e. Germany?

22. Before discussing these questions it should be briefly considered, for completeness's sake, whether Mrs Hartmann could not derive a right to German child-raising allowance from Article 73 of Regulation No 1408/71. This question was dealt with and answered in the negative by the Bundessozialgericht and, consequently, it did not submit any questions on this matter. Nevertheless, Mrs Hartmann and the Spanish Government again raised this issue in their written observations. It was also addressed by the United Kingdom Government and the Commission.

B — *Regulation No 1408/71*

23. According to Article 73 of Regulation No 1408/71 'an employed ... person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, ...'. In *Hoever and Zachow* the Court interpreted this provision to the effect that 'where an employed person is subject to the legislation of a Member State and lives with his or her family in another Member State, that person's spouse is entitled, under Article 73 of Regulation No 1408/71, to receive a benefit such as child-raising allowance in the State of employment.' [18] In other words, contrary to the exact wording of this provision, the spouse of an employed person has an autonomous right to family benefit in the Member State in which the latter is employed.

18 — Joined Cases C-245/94 and C-312/94, cited in footnote 6, at paragraph 38 of the judgment.

24. Although this rule would appear to apply squarely to Mrs Hartmann's situation, the Bundessozialgericht correctly observed that she nevertheless could not claim entitlement to child-raising allowance under Article 73 of Regulation No 1408/71, because as a civil servant Mr Hartmann did not at the relevant time qualify as an 'employed person' for the purposes of the application of Chapter III of this regulation on the granting of family benefits. This restriction was laid down in Point I.C of Annex I to Regulation No 1408/71 and was only withdrawn with the adoption of Regulation No 1399/1999, [19] which entered into force on 1 September 1999. Article 1(7) of this regulation expanded the definition of employed person in the context of Chapter III of Regulation No 1408/71 as regards Germany to 'any established civil servant in receipt of a salary in respect of his/her civil servant status which is at least equal to that which, in the case of an employed person, would result in compulsory insurance against unemployment'.

25. The fact that civil servants were excluded from the scope of the provisions in Regulation No 1408/71 on family benefits has already been confirmed by the Court in *Kulzer*, [20] to which the Bundessozialgericht also referred. In this judgment the Court pointed out that the definition of employed person 'is displaced by the definition in Point I.C of Annex I to the Regulation when the competent institution for granting family benefits is, in accordance with Chapter 7 of Title III of the Regulation, a German institution'. [21] It went on to observe that 'to allow a retired civil servant, such as the plaintiff in the main proceedings, to rely on Article 73 in order to receive German family allowances on the ground that the situation of civil servants must generally be treated in the same way as that of employed persons would involve disregarding the terms of Annex I'. [22]

26. The contention made by Mrs Hartmann and the Spanish Government that the exclusion of civil servants from the applicability of Chapter III of Regulation No 1408/71 is restricted to those civil servants who fulfil functions falling within the scope of Article 39(4) EC as interpreted by the Court, i.e. that they are involved in the exercise of public authority, is untenable. The basic purpose of this provision is to permit the Member States to retain nationality requirements in respect of the fulfilment of certain public functions. It is not designed to delimit the concept of worker as such. Moreover, contrary to the remark made by the Spanish Government, it only constitutes an exception to the provisions laid down in Article 39(1) to (3) EC and not to the other provisions in Title III on the free movement of workers,

19 — Cited in footnote 10.

20 — Case C-194/96 *Kulzer* [1998] ECR I-895.

21 — At paragraph 35 of the judgment.

22 — At paragraph 37 of the judgment. See, too, Case C-266/95 *Merino García* [1997] ECR I-3279, at paragraphs 25 and 26.

more particularly Article 42 EC on the coordination of national social security schemes.

27. The Bundessozialgericht therefore was justified in concentrating its questions on the interpretation to be given to the concept of migrant worker for the purposes of the application of Regulation No 1612/68.

29. In the light of this description of the scope of Article 39 EC, and by implication that of Regulation No 1612/68, it would appear that two situations can be distinguished which are covered by the provisions on the free movement of workers. The first situation is that of what one might term the classical model of a Community national going to live in another Member State to take up employment there. The second situation is that of the frontier worker, where a Community national continues to stay in the Member State of residence, but works in another Member State on a regular basis. In both descriptions the primary factor is that the person has moved to another Member State for purposes of employment.

C — *Regulation No 1612/68: worker status*

28. In defining the scope of the provisions on the free movement of workers the Court has held in a consistent line of cases that 'any Community national who, irrespective of his place of residence and his nationality, has exercised the right to freedom of movement for workers and who has been employed in a Member State other than that of residence falls within the scope of Article [39 EC]'. [23] It has also described the objective of Article 39 EC, which Regulation No 1612/68 seeks to implement, as 'enabling a worker to move freely within the territory of the other Member States and to stay there for the purpose of employment'. [24]

30. Mr Hartmann clearly does not come within either category as his taking up residence in Austria was unrelated to employment purposes.

31. However, as a result of a recent development in the case-law, it may be doubted whether this clear-cut distinction is still valid. In its recent judgment in *Ritter-Coulais*, [25] the Court considered that Article 39 EC could be invoked by a German couple [26] employed in Germany, but resident

23 — Case C-385/00 *de Groot* [2002] ECR I-11819, at paragraph 76, Case C-209/01 *Schilling and Fleck-Schilling* [2003] ECR I-13389, at paragraph 23 and Case C-152/03 *Ritter-Coulais* [2006] ECR I-1711, at paragraph 31.

24 — Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet*, cited in footnote 7.

25 — Cited in footnote 23.

26 — In fact, to be precise, Mr Ritter-Coulais had German nationality only; Mrs Ritter-Coulais had dual French and German nationality.

in France for the purpose of ensuring that rental income losses relating to their private house in France should be taken into account in determining their income tax liability in Germany. After having recalled the case-law referred to in the previous paragraph, the Court concluded 'that the situation of the appellants in the main proceedings, who worked in a Member State other than that of their actual place of residence, falls within the scope of Article [39] EC'. [27]

32. This finding by the Court would imply that as soon as it is established that a person is resident in one Member State, but is employed in another, this is sufficient to trigger the applicability of Article 39 EC. In other words in this approach the reasons for the Community national transferring his residence to another Member State are irrelevant. If this is indeed the case, there is no problem in subsuming the facts of the present case under this rule in order to find that Mr Hartmann has indeed acquired the status of a Community worker by transferring his residence to Austria. It is, however, questionable whether this result is in conformity with the Community system of free movement of persons between the Member States as laid down in the EC Treaty.

33. This system is based on the distinction between four categories of free movement depending on the reasons for which a Community national wishes to move to another Member State. Initially, under the EEC Treaty, a right of free movement was granted for economic purposes only and separate legal regimes were established for nationals of the Member States wishing to move to other Member States for purposes of employment, establishment and the provision of services. Later, with the introduction of the provisions on European citizenship by the Maastricht Treaty, nationals of Member States were also granted the right to move to other Member States and to reside there for non-economic reasons.

34. The rights which are connected with each category of free movement differ, although in the course of the years a certain degree of convergence has been attained in the interpretation of the Treaty provisions on workers, establishment and services and there is greater homogeneity in the manner in which these provisions are applied. The Treaty provisions on citizenship, by contrast, remain a distinct category and the rights which may be derived from this status, though evolving, are restricted by comparison to those which flow from the economic freedoms. In order to determine which Treaty provision, and therefore which legal regime, is applicable to a given situation, it is still essential to establish, in an objective sense, the reason for which the person concerned exercises his right to move to another Member State. This constitutes the connecting factor with this or that Treaty provision on free movement.

27 — At paragraph 32 of the judgment.

35. In line with this approach, in *Werner*[28] the Court found that a German dentist who had acquired all his professional qualifications in Germany, had practised his profession only in Germany and was subject to German tax legislation, but was resident in the Netherlands, could not rely on Article 43 EC to oppose a heavier tax burden being imposed on him than would have been the case if he had resided in Germany. The only factor which took Mr Werner's case out of a purely national context is that he lived in another Member State than that in which he practised his profession.[29] The simple fact that he had gone to live in the Netherlands was insufficient to conclude that his professional activity in Germany amounted to cross-border establishment enabling him to invoke Article 43 EC.

36. It should be observed that *Werner* predated the entry into force of the provisions on citizenship. Had the facts of this case occurred at a later date, the outcome may have been different, given the present-day insights on the scope of these provisions.

37. This observation may provide an explanation for the approach adopted by the Court in *Ritter-Coulais*. Where the subject-matter of this case fell ratione materiae within the ambit of the provisions on the free movement of capital (deductibility of rental income losses from immoveable property for tax purposes) and, in my view, ratione personae under the provisions of citizenship, neither of these were applicable ratione temporis as the case related to the 1987 tax year. At the suggestion of the Commission the Court therefore considered the case under Article 48 EEC [now Article 39 EC] and arrived at the conclusion cited in paragraph 31 above.

38. Where the factual context underlying *Ritter-Coulais* was broadly similar to that in *Werner*, it would appear to me that the Court should have approached this case in the same manner. I am aware that this would have produced a result which may have been regarded as unsatisfactory in the light of the law as it stands today. It *is* the result which would have been in conformity with the law as it stood in 1987. The consequence of the approach followed in *Ritter-Coulais* is that the distinction between the free movement of workers and the freedom to move on the basis of European citizenship has become blurred. Under this approach, where a European citizen moves to another Member State for non-economic reasons, this may result in his being able to claim rights which in the present system are reserved to those who have exercised their freedom for reasons of employment, establishment or the provision of services.

28 — Case C-112/91 *Werner* [1993] ECR I-429.

29 — Paragraph 16 of this judgment.

39. It is necessary in this context to refer to one further case, *Elsen*,[30] which was given some attention by the German and United Kingdom Governments, as the factual basis shows some resemblance to the case in hand. Here the Court found that a German woman, who had worked in Germany and had transferred her residence to France whilst continuing to work in Germany, could, as a former frontier worker, rely on Articles 18, 39 and 42 EC in order to have the period of time taken for rearing her child in France taken into account for the purpose of calculating her old-age pension in Germany.

40. I do not consider, however, that it can be inferred from this judgment that a person in gainful occupation in one Member State who moves only to live in another Member State must automatically be regarded as a worker for the purposes of the application of Article 39 EC and Regulation No 1612/68. Although the Court, in the operational part of its judgment, referred to Articles 39 EC and 42 EC, it is clear that the aspect of Mrs Elsen's precise status was examined and determined in the light of Article 13(2)(a) and (b) of Regulation No 1408/71. It was because Mrs Elsen 'worked exclusively in Germany and was subject, as a frontier worker, to the German legislation when the child was born [that] a close link [could] be established between the periods of child-rearing concerned and the periods of insurance completed in Germany by virtue of her occupational activity in that State'.[31] In consequence, she was subject to German legislation for the purposes of calculating her old-age pension even after having ceased all gainful employment in that Member State. The fact that Mrs Elsen could be considered to be a frontier worker for the purpose of determining that she was subject to German social security legislation does not mean that she had worker status in a more general sense for the purposes of the application of the provisions on the free movement of workers. The Court, on more than one occasion, has pointed out that 'the definition of worker used in the context of Article [39] of the EC Treaty and Regulation No 1612/68 does not necessarily coincide with the definition applied in relation to Article [42] of the EC Treaty and Regulation No 1408/71'.[32]

41. More generally, it is useful to recall from the economic perspective that the basic rules on the common market were designed to liberalise the movement, not only of the output of the economic process (goods and services), but also of the input of the economic process, i.e. the factors of production (labour and capital). In this regard, it is possible to dissociate the migrant citizen as a person from what he represents in economic terms. Where, a worker moves to another Member State to work and live there or to work there while continuing to live in his

30 — Case C-135/99 *Elsen* [2000] ECR I-10409.

31 — At paragraph 26 of the judgment.

32 — Case C-85/96 *Martínez Sala* [1998] ECR I-2691, at paragraph 31.

Member State of origin, the factor labour is transferred to the Member State of employment. By contrast, where, as in the case in hand, a person moves to another Member State to live there only, but retains his employment relationship in his Member State of origin, this means that the factor of production labour remains in situ. The employment relationship, and therefore the factor labour, has not shifted to another Member State. Then there is no basis for the application of Article 39 EC as the connecting factor triggering the application of this provision is absent.

42. Having regard to the Community system governing the free movement of persons, a situation such as that in the main proceedings comes clearly within the scope of Article 18 EC on citizenship. I will return to this aspect below.

43. This brings me to the conclusion that a person may only be regarded to be a migrant worker for the purposes of the application of Regulation No 1612/68 where he has moved to another Member State with the intention of seeking or taking up employment in that Member State. Where he has moved to another Member State for reasons which are unconnected with seeking or taking up employment there, the provisions on the free movement of workers do not apply to him. A person who has exercised his freedom to move to another Member State for non-economic reasons comes within the ambit of the Treaty provisions on citizenship only.

44. Although this conclusion answers the first question referred by the Bundessozialgericht, and, in view of the conditional nature of the second question, there is no need to address it, I will continue the analysis on the presumption that the Court may nevertheless find that Mr Hartmann has acquired worker status. This concerns the question as to whether a migrant worker in his situation can claim equal treatment in respect of the granting of social advantages under Article 7(2) of Regulation No 1612/68.

D — *Regulation No 1612/68: frontier workers and social advantages*

45. If Mr Hartmann is to be considered as a migrant or frontier worker or as having a status analogous to that of a frontier worker, this does not entail automatically that he is entitled to equal treatment in respect of all social advantages provided within the Member State of employment. Such entitlement depends, I would suggest, on the purpose for which Article 7(2) of Regulation No 1612/68 prescribes that migrant workers shall enjoy the same social and tax advantages as national workers.

46. In this regard the Court in settled case-law has affirmed that 'the reference to "social

advantages" in Article 7(2) cannot be interpreted restrictively'[33] and that '"social advantages" should be interpreted as meaning all advantages which, whether or not linked to a contract of employment, are generally granted to national workers because of their objective status as workers or by virtue of the mere fact of their residence on the national territory, and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community'.[34]

47. Despite the fact that the concept of social advantage should not be interpreted restrictively, the Court's definition contains a number of elements which imply that it is not unrestricted either. Thus the Court indicates that the advantage concerned must be granted because of the *objective status as a worker* or that it is granted by the mere fact of the *worker's residence on national territory*. In addition, there is a presumption that making such an advantage accessible to migrant workers would *facilitate their mobility* within the Community.

48. In the rather different context of characterising student maintenance assistance as a social advantage within the meaning of Regulation No 1612/68, the Court has also made the general observation that 'the equal treatment, in relation to national workers, to which workers of a Member State who are employed in another Member State are entitled as regards the benefits granted to members of their families, *contributes to their integration in the society of the host country*, in accordance with the aims of the freedom of movement for workers'.[35]

49. These considerations of the Court all focus on the situation of workers who have moved from their home country to another Member State to live and work in the host Member State. Equal treatment of this category of workers in respect of the provision of social advantages, as provided for in Article 7(2) of Regulation No 1612/68, serves to enhance their chances of social integration in their new State of residence and to increase their chances of participating in national society. Frontier workers are evidently in a different position as they retain their residence in their Member State of origin where, it may be presumed, they are already fully integrated. Although this category of workers also benefits from the protection of Article 39 EC and the various other provisions on the free movement of workers, it would seem that, functionally, this protection need only be aimed at unequal treatment in respect of employment conditions. Frontier workers should not be

33 — Case 32/75 *Cristini* v *SNCF* [1975] ECR 1085, at paragraph 12, and Case C-57/96 *Meints* [1997] ECR I-6689, at paragraph 39.

34 — Case C-310/91 *Schmid* v *Belgian State* [1993] ECR I-3011, at paragraph 18, and Case C-57/96 *Meints*, cited in previous footnote, at paragraph 39.

35 — Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723, at paragraph 20 [emphasis added].

allowed to be treated differently as regards, for example their remuneration or specific work-related benefits, for the sole reason that they are not resident in the Member State of employment. As regards benefits which relate to their capacity as a member of society it is the Member State where they reside which is competent.

50. In relation to this latter aspect, both the Bundessozialgericht in its order for reference and the German and United Kingdom Governments in their submissions to the Court point out that it is not to be excluded that a person in Mr Hartmann's position might be eligible for similar benefits to the child-raising allowance in his country of residence. As Regulation No 1612/68, unlike Regulation No 1408/71, has no mechanism aimed at the prevention of overlapping benefits, one should be reticent in accepting that social advantages are exportable without further ado. I agree with the German Government that where it has been established that a given benefit has not been made exportable under Regulation No 1408/71 for the reason that the potential beneficiary falls outside the scope ratione personae of this regulation, as is the case in the present proceedings, this result should not be cancelled out by allowing the benefit concerned to be accessed through the equal treatment rule of Article 7(2) of Regulation No 1612/68. This would appear to be the precise purpose of Article 42(2) of Regulation No 1612/68, according to which this regulation shall not affect measures taken in accordance with Article 42 EC, i.e. Regulation No 1408/71. This provision therefore establishes a relative hierarchy between both regulations, in that Regulation No 1408/71 as the more specific regulation should take precedence over Article 7(2) of Regulation No 1612/68, in cases in which the application of both regulations lead to conflicting results.

51. This reading according to which Article 7(2) of Regulation No 1612/68 is intended primarily for migrant workers taking up residence in the Member State of employment and can only be invoked by frontier workers in respect of benefits which are directly linked with their employment relationship is borne out by the wording of this provision. As was pointed out by the German Government at the hearing, the German language version of this provision specifies by means of the word 'dort' that the social advantages are to be enjoyed in the territory of the Member State of employment. Two of the other official language versions at the time of the adoption of Regulation No 1612/68 use the same terminology (French: Il *y* bénéficie ...; Dutch: Hij geniet *er* ...); only the Italian version does not contain such a reference.

52. Where it is suggested that it appears from the fourth consideration to the

Preamble to Regulation No 1612/68 that frontier workers fall fully within the scope of the protection of this regulation, it would seem that this consideration refers in particular ('such right') to the right to move for purposes of employment and the right to pursue the activity of their choice. [36] The fifth consideration, [37] by contrast, deals with matters which can have no bearing on the situation of frontier workers such as eligibility for housing, the right for the worker to be joined by his family and the conditions for integration of that family into the host country. This, too, suggests that frontier workers can only enjoy the rights laid down in Regulation No 1612/68 in so far as these bear a functional relationship to their employment in the host Member State.

53. The restriction of the scope ratione materiae of Article 7(2) of Regulation No 1612/68 as regards frontier workers is consistent with the Court's judgment in *Meints*. [38] This case concerned the eligibility of a German frontier worker who had been employed on a farm in the Netherlands whilst continuing to reside in Germany to a special benefit for agricultural workers whose contract of employment had been terminated as a result of setting aside of land belonging to their former employer. The Court found that such a benefit could be regarded as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68 'since entitlement to the benefit is intrinsically linked to the recipients' objective status as workers'. [39]

54. It is true that in *Meints* the Court explicitly rejected the contention of the Governments of two Member States that Regulation No 1612/68 does not provide for the possibility of exporting social advantages. In doing so, it referred to the fourth recital in the preamble to this regulation, cited above, and to the fact that Article 7 refers without restriction to workers who are the nationals of a Member State. [40] Although worded in general terms, it would appear to me that the Court's reaction to this point was determined by the particular nature of the social benefit at issue in this case, which was clearly employment-related and, therefore, could be regarded as exportable. Its reference to

36 — The third and fourth considerations of the Preamble to Regulation No 1612/68 read as follows: 'Whereas freedom of movement constitutes a fundamental right of workers and their families; whereas mobility of labour within the Community must be one of the means by which the worker is guaranteed the possibility of improving his living and working conditions and promoting his social advancement, while helping to satisfy the requirements of the economies of the Member States; whereas the right of all workers in the Member States to pursue the activity of their choice within the Community should be affirmed; whereas *such right* must be enjoyed without discrimination by permanent, seasonal and frontier workers and by those who pursue their activities for the purpose of providing services' [emphasis added]

37 — 'Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country.'

38 — Cited in footnote 33.

39 — At paragraph 41 of the judgment.

40 — At paragraphs 49 and 50 of the judgment.

the preamble does not, in my view, imply that frontier workers enjoy equal treatment in respect of all social advantages available in the Member State of employment, as I pointed out in point 52 above. I agree in this regard with Advocate General Lenz who in his Opinion in *Meints* observed:

'It seems to me that there is no justification for the fears ... that, given this assessment of the position of frontier workers, social assistance benefits would become exportable, a result which Regulation No 1408/71 seeks to prevent expressly and Regulation No 1612/68 implicitly.

... The specific contract of employment must be the point of connection for the grant of a social advantage. In substance, at least, this requirement has already been taken into account by the Court in referring to objective status as a worker and to the contract of employment when defining social advantages. There is no question of having to pay in future all social assistance benefits across borders as a result of Article 7(2) of Regulation No 1612/68. It is precisely the link with status as a worker and the contract of employment which excludes conventional social assistance benefits.' [41]

55. My conclusion on this point is, therefore, that in the context of Article 7(2) of Regulation No 1612/68 frontier workers are entitled to equal treatment in the Member State of employment in respect of the granting of social advantages only to the extent that such advantages are directly and exclusively linked to employment.

E — *Child-raising allowance and employment*

56. The question which next arises is whether the child-raising allowance provided for under the BErzGG can be considered to be a social advantage which is sufficiently linked to employment for it to be able to be claimed by frontier workers or persons in Mr Hartmann's situation and, through them, by their spouses. As such this is a factual question which should be dealt with by the national court. However, the Court has already expressed itself on the character of child-raising allowance in the context of a case concerning of workers resident in the Member State of employment. In *Martínez Sala* it found that as the child-raising allowance under the BErzGG is granted inter alia to part-time workers, it must be regarded as a social advantage within the meaning of Article 7(2) of Regulation No 1612/68. [42]

41 — At points 57 and 58 of his Opinion in *Meints* (cited in footnote 33).

42 — Case C-85/96 *Martínez Sala*, cited in footnote 32, at paragraph 26 of the judgment.

57. In *Hoever and Zachow*,[43] in which this question was raised in respect of frontier workers, it did not have to answer the question whether child-raising allowance is an employment-related social advantage, as the case was decided on the basis of Article 73 of Regulation No 1408/71. Nevertheless, in its judgment it did characterise child-raising allowance as being 'intended to enable one of the parents to devote himself or herself to the raising of a young child' and being 'aimed more particularly at remunerating the service of bringing up a child, meeting other costs of caring for and bringing up a child and, as the case may be, mitigating the financial disadvantages entailed in giving up income from full-time employment'.[44] This description suggests that, even though part-time workers are eligible for this benefit, the connection with employment is tenuous.

58. In its order for reference, the Bundessozialgericht pointed out that the BErzGG does not link an entitlement to benefit to an employment relationship and that, in fact, too extensive gainful employment even precludes entitlement to child-raising allowance. Yet, it also observes that a present or previous employment or civil service relationship established in Germany is important precisely where benefits are exported In explaining its doubts as to the lawfulness under Community law of the restriction on the exportability of child-raising allowance for frontier workers it considers that the requirement of more than minor employment in Germany is inherently rather illogical for child-raising allowance, in particular since that benefit is intended not least to allow the possibility of not having to engage in paid employment. It also sees an evident discrepancy in the coexistence of the exclusion of persons in full employment and the requirement (applicable to frontier workers) of exceeding a minor employment threshold in order to be eligible for child-raising allowance.

59. It follows from the characterisation of child-raising allowance given by both the Court in *Hoever and Zachow* and by the Bundessozialgericht in its order for reference, that the essential purpose of this benefit is to reward a person, who has either never been engaged in a gainful occupation or who has given up fully or partially an employment relationship in order to rear a child, for the economic inactivity which this entails. This allowance is, therefore, intrinsically quite the opposite of a benefit being attached to employment. It is true that the German legislature extended eligibility to child-raising allowance to two categories of persons who do have a link with the employment market in Germany (indirectly: spouses of civil servants as from 2001; directly: frontier workers in more than minor employment). Although the introduction of this criterion would seem to contradict the conclusion that child-raising allowance is unrelated to employment, this criterion merely serves as a necessary connecting factor with the German legal order to

43 — Cited in footnote 6.

44 — At paragraph 25 of the judgment.

substitute the requirement of residence, which obviously cannot be applied in these cases. The substantive conditions for eligibility laid down in Paragraphs 1(1)(2) and (3) of the BErzGG remain unrelated to employment, so that the allowance itself serves the same purpose in all cases.

60. On the basis of these considerations I do not consider that the child-raising allowance is sufficiently linked to employment or the objective status as a worker for it to be considered to be a social advantage in respect of which frontier workers may claim equal treatment under Article 7(2) of Regulation No 1612/68.

61. Should the Court or the national court reach a different conclusion regarding the character of the child-raising allowance, it next becomes necessary to consider the compatibility of the residence requirement with Article 7(2) of Regulation No 1612/68.

F — *Indirect discrimination: justified?*

62. It is not contested, even by the German Government, that the residence requirement laid down in Paragraph 1(1)(1) of the BErzGG discriminates indirectly against frontier workers as German nationals can more readily comply with this condition than foreign workers. Consequently it must be examined whether this requirement can be justified and whether it is proportionate to the aim pursued.

63. First of all, it should be recalled that the Court has already found in a number of cases that a residence requirement imposed in respect of similar social advantages could not be justified in the light of the objectives for which those requirements were imposed. Thus the Grand Duchy of Luxembourg was unsuccessful in convincing the Court that a one-year residence requirement together with the obligation to undergo periodic medical examinations which were imposed as conditions for eligibility for childbirth and maternity allowances was justified for reasons of public health. [45]

64. Again, in *Meints* the Court found that a residence requirement was neither necessary nor appropriate in order to achieve the aim of excluding persons laid off as a result of their own action from entitlement to a special agricultural unemployment benefit. It considered that the applicant's place of residence was irrelevant to determining

45 — Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, at paragraphs 12, 15 and 34.

whether he was laid off as a result of his own action. [46]

65. In this case, the Bundessozialgericht has only asked a question in relation to the compatibility with Article 7(2) of Regulation No 1612/68 of the requirement that an applicant for child-raising benefit must have his permanent residence or his habitual place of stay in Germany. The doubts it expressed as to the justification of the requirements laid down in the BErzGG concerned mainly the requirements imposed on frontier workers as regards a minimum degree of employment. As these conditions are not expressly a subject of the present preliminary reference, but have been raised in the context of Case C-213/05, *Geven*, [47] I will discuss them in my Opinion in that case which will be presented together with the present Opinion.

66. In order to determine the purpose for which child-raising benefit is made available in Germany, it is once again appropriate to refer to the Bundessozialgericht's observations on this point in its order for reference. On the basis of the explanatory memorandum to the draft-BErzGG and national case-law, it summarised these objectives in the following terms:

'The receipt of child-raising allowance is intended to allow or make it easier for one of the parents to concentrate on caring for and raising a child in the first phase of life, which is crucial for all subsequent development ... The payment serves to recognise the work done by young families in raising children ... and to stimulate the birth rate, making it easier to take a decision in favour of having the child and against a termination ... The primary purpose is to allow parents to care for their children themselves by not engaging in or restricting paid employment ... The legislature's motive is also the underlying idea that raising a child in Germany makes a contribution to the future political, economic and social existence of society in that country .... The legislature therefore acted in such a way that it restricted entitlement to child-raising allowance for foreign nationals residing in Germany ... to those who can be expected to remain in Germany permanently ...; similarly it did not consider that it had to allow the receipt of benefit where, in the case of residence abroad, there was no comparable connection in the form of a contribution to the labour market or to national society.'

67. It is apparent from this description that the child-raising allowance must be regarded as an instrument of national family policy

46 — Case C-57/96 *Meints*, cited in footnote 33, at paragraph 48 of the judgment.

47 — See point 2 of this Opinion.

which serves social, economic and demographic objectives in the longer term. The Court, too, has recognised that this is the essential nature of the child-raising allowance, where it characterises it as 'a non-contributory benefit forming part of a set of family-policy measures'. [48]

68. However, the question is whether a Member State may impose a residence requirement in respect of entitlement to benefits provided with a view to attaining such legitimate policy objectives. According to settled case-law such a requirement can be justified only if it is based on objective considerations independent of the nationality of the persons concerned and is proportionate to the legitimate aim of the national provisions concerned. [49]

69. There can be no doubt that the Member States are wholly justified in pursuing policies aimed at promoting childbirth with a view to guaranteeing a certain degree of stability in the demographic composition of their populations. By their very nature such policies must ensure that measures taken are aimed at the persons resident on their national territories. By the same token, it would be absurd to assume that Member States should in any way contribute to the demographic developments in other Member States by extending their family policy instruments to persons who do not reside in their territory. It would therefore seem that a residence requirement is appropriate to ensure that the child-raising allowance is provided to persons who belong to the Member State's national population, which, of course, includes not only German nationals, but all persons lawfully resident in Germany irrespective of their nationality.

70. In this regard, I see a clear parallel between the residence requirements which were at issue in *Collins*, [50] *Bidar* [51] and *De Cuyper*. [52]

71. In *Collins*, the Court accepted that it was 'legitimate for a Member State to grant a jobseeker's allowance only after it has been established that a genuine link exists between the person seeking work and the employment market of that State'. In order to comply with the principle of proportionality the period of residence required should 'not exceed what is necessary in order for the national authorities to be able to satisfy

48 — Case C-85/96 *Martínez Sala*, cited in footnote 32, at paragraph 8 of the judgment.

49 — See, for example, Case C-138/02 *Collins* [2004] ECR I-2703, at paragraph 66.

50 — Cited in the previous footnote.

51 — Cited in footnote 13.

52 — Case C-406/04 *De Cuyper* [2006] ECR I-6947.

themselves that the person concerned is genuinely seeking work in the employment market of the host Member State.' [53]

72. In *Bidar* the Court considered it legitimate for the Member States to require that a student demonstrate a certain degree of integration into the society of that State in order to be eligible for student maintenance assistance in that Member State. A requirement of three years, prior residence was found to be a sufficient guarantee in this regard.. However, as a student was also required to demonstrate that he was settled in the United Kingdom and the national rules at issue precluded a national from another Member State obtaining settled status as a student, they made it impossible for such a national, whatever his degree of integration, to access this benefit. [54]

73. Most recently in *De Cuyper*, the Court found that a Member State was justified in imposing a requirement of actual residence on an unemployed person of over 50 years of age who is exempt from the requirement of proving that he is available for work as a condition for retaining his entitlement to unemployment benefit. This requirement was necessary with a view to monitoring the employment and family situation of unemployed persons and to take account of changes in the personal circumstances which may have an effect on the benefit granted. As less restrictive measures would also have been less effective the residence requirement was also deemed proportionate to this aim. [55]

74. In all these cases there was a clear relationship between the nature of the benefit and the type of link with the Member State which was required for eligibility for that benefit.

75. In the present case, the residence requirement serves to ensure that child-raising benefit is received by persons of whom it is likely that they will belong to the German population on a lasting basis and is therefore an appropriate instrument for attaining the family-policy objectives for which this benefit is provided. The benefit is provided irrespective of nationality and as no further conditions as to the duration of the period of residence appear to be set, the residence requirement also can be regarded as being proportionate to this aim. I would add that the question of the justification of the residence requirement as such must of course be distinguished from that relating to the methods of proof of residence which were at issue in *Martínez Sala*.

53 — Cited in footnote 49, at paragraphs 69 and 72 of the judgment.

54 — Cited in footnote 13, at paragraphs 57 to 61 of the judgment.

55 — Cited in footnote 52, at paragraphs 41 to 48 of the judgment.

76. My conclusion on this point is, therefore, that the residence requirement laid down in Paragraph 1(1) of the BErzGG is justified.

G — *Article 18 EC: restriction of citizenship rights?*

77. The question as to the possible application of Article 18 EC in this case was raised by the Commission in response to a remark made by the Bundessozialgericht in its order for reference that a less narrow interpretation of the notion of freedom of movement under Regulation No 1612/68 might now be possible in view of the fact that Article 18 EC guarantees a general right of stay, independent of any economic activity. Although the national court was not suggesting that Mrs Hartmann may be able to invoke Article 18 EC to challenge the residence requirement in the BErzGG, this question should nevertheless be dealt with.

78. As Mrs Hartmann has not herself exercised any right of free movement within the Community, the only pertinent question under this heading can be whether the refusal to grant Mrs Hartmann child-raising benefit on the grounds that she is not resident in Germany restricted Mr Hartmann in the exercise of his rights to move to Austria and to reside there, as guaranteed by Article 18 EC.

79. First, it should be pointed out that Mr Hartmann moved to Austria in 1990, which is three and a half years before the provisions on citizenship entered into force, on 1 November 1993. This means that the question must be understood as meaning that any restriction flowing from the application of the residence requirement in the BErzGG must relate to his continued residence in Austria after 1 November 1993.

80. Furthermore, it appears from the order for reference that the unsuccessful applications for child-raising benefit for the three children in the Hartmann family related for the first child to a period wholly antedating 1993, for the second child to a period falling partially before and partially after November 1993 and for the third child to a period falling wholly after November 1993. Consequently, any possibility of relying on Article 18 EC in this case could only result in a partial allowance for the second child and a full allowance for the third child.

81. The Court has already considered a number of cases dealing with restrictions

imposed by Member States on their nationals after they had exercised their rights under Article 18 EC to move to another Member State, most notably *D'Hoop* and *Pusa*. [56] In its judgments in these cases, it laid down as a general principle concerning the interpretation of this Treaty provision that 'it would be incompatible with the right of freedom of movement were a citizen, in the Member State of which he is a national, to receive treatment less favourable than he would enjoy if he had not availed himself of the opportunities offered by the Treaty in relation to freedom of movement'. [57] It added that '[n]ational legislation which places at a disadvantage certain of its nationals simply because they have exercised their freedom to move and to reside in another Member State would give rise to inequality of treatment, contrary to the principles which underpin the status of citizen of the Union, that is, the guarantee of the same treatment in law in the exercise of the citizen's freedom to move. Such legislation could be justified only if it were based on objective considerations independent of the nationality of the persons concerned and proportionate to the legitimate aim of the national provisions'. [58]

82. In the two cases cited in the preceding paragraph the parties involved suffered tangible disadvantages as a result of their having exercised their right to move to another Member State. Ms D'Hoop, a Belgian national who had obtained her *baccalauréat* in France, did not qualify under national law for a tideover allowance in Belgium, because she had not completed her secondary education in that Member State. Mr Pusa, a Finnish national who had moved to Spain and whose pension was subject to attachment, was disadvantaged by the fact that Finnish law, in calculating the attachable part of his pension, did not take account of the income tax payable by him in Spain, whereas income tax payable by him in Finland would have been deducted had he remained in Finland. In both cases it was clear that both persons were restricted in their rights under the law of their country of origin and that this was directly attributable to the fact that they had moved to another Member State.

83. By contrast, it is apparent that in the present case Mr Hartmann has not suffered any disadvantage regarding his potential rights under the BErzGG by taking up residence in Austria. Indeed, if he had decided to retain his residence in Germany his Member State of employment, neither he nor his wife would have qualified for child-raising allowance. His move to Austria therefore had no effect in this regard.

84. Mrs Hartmann did not lose any rights as a result of her husband moving to Austria to join her there either. In this respect the

56 — Case C-224/98 *D'Hoop*, cited in footnote 14, and Case C-224/02 *Pusa*, cited in footnote 12.

57 — *D'Hoop*, at paragraph 30 of the judgment, and *Pusa*, at paragraph 18 of the judgment.

58 — *D'Hoop*, at paragraphs 34 to 36 of the judgment, and *Pusa*, at paragraph 20 of the judgment.

situation can be distinguished from that in *Schempp*.[59] In that case, Mrs Schempp's exercise of her citizen's right to move to another Member State had an immediate effect on the legal position of her former husband who had remained in Germany, in that it influenced his capacity to deduct maintenance payments made to her from his taxable income in Germany.[60] Mr Hartmann's move to Austria had no such effects on Mrs Hartmann's possibilities for claiming entitlement to child- raising benefit in Germany.

85. In addition, if Mrs Hartmann were to have any entitlement this could only be exercised through rights enjoyed by her husband. In the absence of any such provision enabling such derived rights to be exercised and in view of the fact that Mr Hartmann at any rate himself apparently does not qualify for child-raising allowance, there is no basis for Mrs Hartmann to claim such entitlement through him.

86. More generally speaking, it should be observed that when a person decides to move to another Member State, exercising his rights under Article 18 EC or any other provision guaranteeing free movement for that matter, this does not guarantee that this transfer of residence or of activities will be neutral from a fiscal point of view.[61] Any choice to go to another Member State involves both incurring certain disadvantages and acquiring new advantages as a result of the differences in legislation between the Member States involved, particularly in the area of social security and taxation. It is up to the Community citizen to weigh these pros and cons in making his decision, but this should not involve an expectation to extend entitlement to any kind of social benefit which his Member State of origin may provide for different policy reasons. As was shown above, this depends wholly on the nature of the benefits involved. Where there is no guarantee of fiscal neutrality in moving residence to another Member State, the same principle should apply to the preservation of social security rights. It should not be overlooked that by transferring his residence to another Member State other forms of entitlement may be opened in the host Member State. To paraphrase the German Government at the hearing, where Member States are obliged not to impose any restrictions on their nationals wishing to move to another Member State, neither are they required to give them a bonus for leaving.

87. There is, therefore, no basis for assuming that the rejection of Mrs Hartmann's applications for child-raising allowance in

59 — Case C-403/03 *Schempp*, cited in footnote 16.

60 — See paragraph 24 of the judgment.

61 — Case C-365/02 *Lindfors* [2004] ECR I-7183, at paragraph 34, and Case C-403/03 *Schempp*, cited in footnote 16, at paragraph 45 of the judgment.

Germany on the grounds that she did not comply with the residence requirement of Paragraph 1(1) of the BErzGG was incompatible with Article 18 EC. Even if it were to be found that these refusals in some way did affect Mr Hartmann's rights to move and reside under Article 18 EC, this restriction must be considered to be justified for the reasons set out in the previous section of this Opinion.

VI — Conclusion

88. In the light of the foregoing observations I would suggest that the the Court give the following answers to the preliminary questions submitted by the Bundessozialgericht:

— A German national who, while continuing his employment relationship as a post office official in Germany, moved his permanent residence from Germany to Austria in 1990 and has since then carried on his occupation as a frontier worker cannot be regarded as a migrant worker within the meaning of Regulation (EEC) No 1612/68 of the Council on freedom of movement for workers within the Community ... for periods between January 1994 and September 1998.

— An Austrian national who has not exercised her freedom to move to another Member State and to reside there, cannot, in the situation in which her husband has moved to her Member State of residence whilst retaining his employment in his Member State of origin, rely on Article 18 EC in order to call into question a residence requirement which is imposed as a condition for entitlement to child-raising benefit in the latter Member State.