JUDGMENT OF THE COURT
31 MARCH 1977 [1]

Carlo Fossi v Bundesknappschaft (preliminary ruling requested by the Bundessozialgericht)

Case 79/76

1. *Social security for migrant workers — Community system — Area of application (EEC Treaty, Article 51)*

2. *Social security for migrant workers — Invalidity and pensions insurance — German legislation — Insurance periods completed before 1945 outside the territory of the Federal Republic of Germany and West Berlin — Benefits — Community law — Inapplicability*

1. Legislation which confers on the beneficiaries a legally defined position which involves no indivudual and discrectionary assessment of need or personal circumstances comes in principle within the field of social security within the meaning of Article 51 of the Treaty and of Regulations Nos 3 and 1408/71.
2. Where the competent insurance institutions to which the persons referred to by German legislation had been affiliated before 1945 no longer exist or are situated outside the territory of the Federal Republic of Germany and the purpose of such legislation is to alleviate certain situations which arose out of events connected with the National Socialist régime and the Second World War and where the payment of the benefits in question to nationals is of a discretionary nature where such nationals are residing abroad, those benefits are not to be regarded as in the nature of social security.

In Case 79/76

Reference to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht (Federal Social Court) for a preliminary ruling in the proceedings pending before that court between

CARLO FOSSI, Florence,

and

BUNDESKNAPPSCHAFT, Bochum,

1 — Language of the Case: German.

on the interpretation of Article 8 of Regulation No 3 and of Article 3 (1) of Regulation No 1408/71,

THE COURT

composed of: H. Kutscher, President, A. M. Donner and P. Pescatore, presidents of Chambers, J. Mertens de Wilmars, M. Sørensen, Lord Mackenzie Stuart, A. O'Keeffe, G. Bosco and A. Touffait, Judges,

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

gives the following

JUDGMENT

Facts and issues

The facts of the action, the procedure and the observations submitted 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 written procedure

Mr Fossi, an Italian national residing in Italy, worked in the Sudetenländische Bergbau AG (German mines in the Sudentenland) from 1 June 1942 to 1 July 1943, during which period he was subject to the compulsory invalidity and pensions insurance scheme of the Sudentendeutsche Knappschaft (the competent social security institution for mineworkers in the Sudentenland).

Since 1958 the competent Italian institution has paid Mr Fossi an invalidity pension on the basis of the insurance periods completed in his country of origin. Although the defendant in the main action awarded Mr Fossi a mineworker's pension under Paragraph 47 of the Reichsknappschaftsgesetz (Law governing the Mineworkers' Association of the Reich) as from 1 February 1970 (the date on which Mr Fossi applied for a pension) on the ground of total disablement, it suspended payment thereof in accordance with the provisions of Paragraphs 105 *et seq.* of the Reichsknappschaftsgesetz on the ground that the person concerned had only been employed and insured outside the territory of the present Federal Republic of Germany.

Mr Fossi met with no success in his claim, action and appeal. The Sozialgericht (Social Court) and the Landessozialgericht (Regional Social Court) took the view that the pension is suspended under Article 105 (1) No (1) of the Reichsknappschaftsgesetz for so long as the person concerned resides outside

the area of application of the Reichsknappschaftsgesetz and that the provisions of Community law governing social security are no obstacle to the application of the provisions of the Reichsknappschaftsgesetz governing suspension. The plaintiff in the main action then appealed to the Bundessozialgericht on a point of law. He maintained that the restriction set out in the annexes to Regulation No 1408/71 of the principle in Article 10 (1) is incompatible with the provisions of Articles 48 *et seq.* of the EEC Treaty and that the contested decision leads to discrimination against foreign nationals.

As the Bundessozialgericht considered the solution of the main action was linked to the application of certain provisions of Community law, it decided, by order of 29 June 1976, to stay the proceedings and, in accordance with Article 177 of the EEC Treaty, to refer the following question to the Court of Justice for a preliminary ruling:

'Is an Italian living in Italy who at no time has lived or worked in the territory of the Federal Republic of Germany or of West Berlin, to be treated, by virtue of Article 8 of Regulation No 3 and Article 3 (1) of Regulation No 1408/71 of the European Economic Community, on the same footing as a German national when applying Paragraph 108 c of the Reichsknappschaftsgesetz, so far as concerns insurance periods which were completed before 1945 with the Reichsknappschaft (Mineworkers' Association of the Reich) under the law of the Reich outside the territory of the Federal Republic of Germany or West Berlin?'

Article 8 of Regulation No 3 provides that:

'Persons permanently resident in the territory of any Member State to whom this regulation applies shall have the same rights and obligations under the social security legislation of every other Member State as the latter's nationals.'

Article 3 (1) of Regulation No 1408/71 provides that:

'Subject to the special provisions of this regulation, persons resident in the territory of one of the Member States to whom this regulation applies shall be subject to the same obligations and enjoy the same benefits under the legislation of any Member State as the nationals of that State.'

Article 10 (1) of Regulation No 1408/71 provides that:

'Save as otherwise provided in this regulation, invalidity, old-age or survivors' cash benefits, pensions for accidents at work or occupational diseases and death grants acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated.'

Annex V B 1 (b) to that regulation provides that:

'Article 10 of the Regulation shall not affect the provisions under which accidents (and occupational diseases) occurring outside the territory of the Federal Republic of Germany, and periods completed outside that territory, do not give rise to payment of benefits, or only give rise to payment of benefits under certain conditions, when those entitled to them reside outside the territory of the Federal Republic of Germany.'

In its order for reference the Bundessozialgericht bases its arguments on the following principal considerations:

— The provision on suspension in Paragraph 105 of the Reichsknappschaftsgesetz, to which foreign

nationals are subject, is inapplicable since under Article 8 of Regulation No 3 and Article 3 (1) of Regulation No 1408/71 Mr Fossi must be treated as a German national. On the other hand, the provision on suspension contained in Paragraphs 107 *et seq.* of the Reichsknappschaftsgesetz applies to Mr Fossi since it also applies to German nationals;

— It emerges from the provisions of Annex G 1 A 2 to Regulation No 3 and of Annex V B 1 b to Regulation No 1408/71 that Article 10 of Regulation No 3 and Article 10 of Regulation No 1408/71 do not prevent the suspension of those parts of a pension which are ascribed to insurance periods completed outside the territory of the Federal Republic of Germany. Suspension is also not precluded by the provisions of Article 51 of the EEC Treaty;

— Since Mr Fossi did not complete insurance periods which are covered by the area of application of the Reichsknappschaftsgesetz his pension is suspended in its entirety;

— Under Paragraph 108 c of the Reichsknappschaftsgesetz, however, the pension may be paid to German nationals who are normally resident abroad, although that discretion does not apply to aliens. Article 8 of Regulation No 3 and Article 3 (1) of Regulation No 1408/71 would for that purpose equate the plaintiff in the main action with a German national if the pension constituted a social security benefit within the meaning of Article 51 of the EEC Treaty, Article 2 (1) (b) of Regulation No 3 and Article 4 (1) (b) of Regulation No 1408/71. Paragraph 108 c 4 of the Reichsknappschaftsgesetz provides, however, that the pension in question shall not be regarded as a social security benefit;

— The competent institution in the main action in fact received no contributions in respect of the insurance periods at issue. The question therefore arises whether, when it pays the pension, the constitution is discharging an original duty or merely a derivative one and the conclusion may be drawn that although the benefit payable under Paragraph 108 c of the Reichsknappschaftsgesetz is founded on insurance contributions it represents a burden arising from the war assumed for reasons of social welfare and presupposes the materialization of the risks in the form of occupational invalidity or of disablement.

The order making the reference was received at the Court on 6 August 1976.

The Government of the Federal Republic of Germany, represented by Professor K. Jantz and M. Seidel, acting as Agents, the Government of the Italian Republic, represented by the Ambassador, A. Maresca, and the Avvocato dello Stato, A. Marzano, acting as Agents, and the Commission of the European Communities, represented by its Legal Adviser, N. Koch, acting as Agent, submitted written observations under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC.

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

II — Summary of the written observations submitted to the Court

First of all, *the Government of the Federal Republic of Germany* gives certain details concerning the substitute pensions (Fremdrenten) and the pensions awarded to certain categories of persons who are resident abroad (Auslandsrenten). It has been provided that refugees and persons deported who could no longer enforce their acquired rights to social security or their rights to future

enjoyment, either because the competent insurance institutions no longer existed or because they were outside the territory of the Federal Republic, may now claim them from the competent insurance institution in the Federal Republic on the ground that they resided there. Such assimilation is intended to facilitate the economic and social integration of the persons concerned into the public and economic life of the Federal Republic. However, the fact that the legislature chose, for the purposes of achieving that object, to solve the problem of compensation by adopting 'provisions of social security law' cannot prevent the Auslands- und Fremdrentengesetz from being in the nature of compensation for certain burdens arising from the war.

The aim pursued explains why responsibility for payment was only provided for in those cases in which the persons concerned — whether or not German nationals — had taken up residence in the Federal Republic. Those who after the war had taken up residence outside the territory of the Federal Republic of Germany had not contributed by their labour to the reconstruction of the German economy and of the German State.

As regards German nationals residing abroad, however, in particular those who had previously suffered under the National Socialist régime, the Fremdrenten- und Auslandsrentengesetz established a scheme which was intended to moderate the existing excessively strict rules but which is quite atypic and foreign to the German pension law system. It has also expressly provided that the benefits paid under that scheme do not form part of the social security system (the expenses incurred by the insurance institutions thereunder are borne by the Federal budget).

The abovementioned position adopted by the German legislature has been accepted by foreign States and all the countries with which the Federal Republic has concluded conventions on social security have accepted the viewpoint of the Federal Government.

The Fremdrenten- und Auslandsrenten-Neuregelungsgesetz of 25 February 1960 *(in extenso:* Law amending the scheme governing substitute pensions and pensions awarded to certain categories of persons who are resident abroad and adapting the pension insurance scheme for Berlin to the terms of the law amending the pension insurance scheme for workers and of the law amending the pension insurance scheme for employed persons, Bundesgesetzblatt I, p. 93) amended the Fremdrenten- und Auslandsrentengesetz of 1953. When it adopted that amending law, which was intended to improve the legal position of refugees and persons deported, the legislature made a logical application of the principle of the integration of such persons into the community of insured persons in the Federal Republic. That necessarily brought about a certain modification of the legal position where the beneficiaries were resident abroad. The logical application of the principle of integration required that all persons resident abroad who had completed insurance periods outside the territory of the Federal Republic be informed in advance of the benefits which they would be awarded if they transferred their place of residence to the territory of the Federal Republic. Accordingly, the principle of the existence of an obligation on the part of the insurance institutions of the Federal Republic to pay benefits to such persons was recognized at that time but the payment of the amount of the benefits was declared suspended as long as the persons concerned were residing abroad. That system left intact the fundamental principles laid down by Paragraph 9 of the Fremdrenten- und Auslands-rentengesetz.

The territorial area of application of Regulations Nos 3 and 1408/71, which were adopted in order to facilitate the

free movement of migrant workers within the Community, corresponds to the territory of the European Economic Community. The territorial area of application of the rights of free movement and the Community system of aggregation, for the purposes of acquiring a right to social security benefits and for the calculation of such benefits, of all periods completed under national systems of legislation cannot be restricted or, *a contrario,* extended by legislative measures adopted by the Member States.

It follows that although, when Regulation No 3 was adopted, the German legislation on pension insurance allowed periods completed before 1945 outside the territory of the Federal Republic of Germany to be taken into account, the implementation of Regulations Nos 3 and 1408/71 as regards their territorial area of application as defined by the Treaty of Rome cannot result in an extension in certain cases of the area of free movement. Assuming that, contrary to the doubts expressed below, it is still compatible with the basic concept of the Community for a person to benefit from insurance periods which he had previously completed in another Member State without having to rely on the rights of free movement, the extension of such an advantage through the effect of Community law, to insurance periods completed before the establishment of the Community in territories which are outside that Member State probably goes beyond the objectives of the Community and the aim of freedom of movement.

It is in any case very doubtful whether a worker who has never made use of his right of free movement may rely on the principle of equality of treatment laid down by Regulation Nos 3 and 1408/71. In the statement of reasons for the proposal for what was to become Regulation No 1408/71 the Commission rightly defined the persons covered by the regulation as only those 'moving within the Community'.

The German Government maintains that the rules laid down by Paragraph 108 c of the Reichsknappschaftsgesetz are not covered by the Community concept of social security. In fact, the provisions in question constitute rules relating to burdens arising from the war which, in accordance with the basic principle in Article 2 (3) of Regulations No 3 or of Article 4 (4) of Regulation No 1408/71, is excluded from the area of social security. In addition, the provisions of Paragraph 108 c do not confer any right on the person which they are intended to benefit but leave the grant of a benefit to the competent institution, which is required to exercise its discretion. Finally, the origin of Regulations Nos 3 and 1408/71 also shows that the particular rule laid down by Paragraph 108 c is not contained in the Community concept of social security. When Regulation No 3 was adopted the other Member States were aware that the Federal Government had protected the refugees and persons deported who had taken up residence within its territory by means of the Fremdrenten- und Auslandsrentengesetz but that persons not resident within Federal territory were only covered by special restrictive rules, similar in nature to assistance. The Federal Government therefore had no reason to ask expressly for any exception to be made to the principle of equality of treatment, in addition to the derogation from the basic rule laid down in Annex G I A (2) of Regulation No 3 and Annex V B 1 (b) of Regulation No 1408/71.

Even supposing that Paragraph 108 c is covered by the concept of social security, it is not covered by the Community system. The paragraph in question is typical of the many rules adopted as a consequence of the war. Rules relating to insurance obligations became necessary each time that as a result of territorial changes or movements of population, generally as a consequence of war, social insurance institutions were divided, disestablished or taken over by new institutions, or that the rights acquired or

whose enjoyment was expected were no longer granted by the insurance institution which was originally competent.

On the other hand, the principle of freedom of movement for workers as laid down by the rules of the EEC Treaty and by the regulations adopted in implementation thereof forms a system which is oriented towards the future and which serves to allow the movement of labour within the Community. Its aim cannot be to challenge or even to set aside the rules relating to the distribution of social security burdens, whose purpose is to make a final settlement of a past situation. That view is not contradicted by the fact that, in accordance with its basic aim, the Community system of social security must also cover insurance periods completed before the entry into force of the EEC regulations. Such retroactive effect is not intended to amend retrospectively the rules governing those insurance obligations which arise out of the insurance periods in question, by providing for a different method of transfer or for a different distribution. The fact that the Community legislature was aware of that restriction when it adopted Regulation No 3 is shown by Annexes D and G to that regulation, which provide that the rules relating to the insurance obligations in question remained applicable.

The legal difficulties raised by the integration of the insurance periods in question into the social security system of a particular Member State are insurmountable. Furthermore, to amend rules concerning the insurance obligations which also settled the financial problems which arose would require new financial arrangements. Thus, Regulations Nos 3 and 1408/71 did not affect the provisions governing the insurance obligations, whether adopted unilaterally or on the basis of a bilateral treaty. In so far as such provisions have been adopted unilaterally by a Member State, complementary provisions are generally to be found in the internal law of the third State with which it has been impossible to make an agreement which is, *per se,* necessary on the question of the insurance obligations. Thus, in its statement of reasons for its proposal for a regulation, the Commission rightly maintained that the rules contained in Annex II to Regulation No 1408/71 may attach reservations to the principle of equality of treatment, in particular so as to permit of bilateral provisions governing questions other than those dealt with in the regulation, that is, chiefly, provisions concerning periods of war whose application to persons other than those for whom they were adopted would raise innumerable difficulties.

The *Government of the Italian Republic* observes, first of all, that the question referred to the Court for a preliminary ruling does not concern the possibility of 'suspending' the award of the pension, on the ground that the recipient resides in another Member State, so much as the exercise, in favour of the nationals of other Member States, of the discretionary power by which the German insurance organization may pay the pension to German nationals, even in the case of residence abroad.

Although residence in another Member State is quite exceptional for German pensioners, it is quite normal and common for other, non-German, Community nationals. For that reason, the criterion adopted by the German legislature does not ensure substantial equality of treatment and reference must be made to the view taken by the Court of Justice, which tends to hold that discrimination which, although based on criteria other than nationality, leads in fact to the same result is not permissible.

The doubts as to whether the pension in question may be described as a social security benefit appear to be unfounded, since in the light of the very content and purpose of the benefit, its connexion

with the system of contributions paid by the recipients and the name given to the administrative authorities which are competent to award it, that description must be used. The Italian Government refers to the views expressed in Case 187/73 *(Callemeyn* v *Belgian State,* [1974] ECR 553).

To deny the applicability of the Community rules in the present case on the ground that the plaintiff is a pensioner rather than a worker who has actually been employed in Germany is incompatible with the very aims of the Community legal order and is likely to result in discrimination which is not permissible.

To the extent to which the exception in Annex V C 1 b to the general principle contained in Article 10 of Regulation No 1408/71 refers only to benefits payable in respect of accident or occupational disease, it appears to be inapplicable to the main action, since that action concerns a genuine invalidity benefit. Furthermore, secondary Community legislation cannot compromise and have a concrete effect on the application of such fundamental principles of the EEC Treaty as the principle of non-discrimination. Similarly, it is necessary to rule out any idea that overwhelming importance is to be attached to the discretionary power available to the administrative authorities.

Irrespective of the foregoing, in the light of the general and fundamental principle in Article 7 of the EEC Treaty an affirmative reply must be given to the question submitted. In this case the nationality rather than the place of residence is important and the practical result of any different solution would be to afford to the nationals of the other Member States, contrary to the guiding principles of the Community legal order, even less favourable treatment than for the nationals of third States (who may be the former German citizens to which the national provision in question refers).

The Italian Government refers to the observations made in its statement in Case 32/75 *(Cristini* v *SNCF* [1975] ECR 1085).

The *Commission* observes that the Bundessozialgericht judges whether the suspensory provisions of Paragraphs 105 *et seq.* of the Reichsknappschaftsgesetz are generally compatible with Community law solely in the light of the rule of equality of treatment and not of the guarantee that the benefit will be payable abroad.

However, one question remains open: whether the freedom of the German legislature to provide for the exportation of the benefit is inherent, in that the Community law is, in principle, inapplicable to insurance periods completed outside the territory of the Member States, or whether it is derived from the fact that the validity of Article 10 of Regulation No 3 and Article 10 of Regulation No 1408/71, which cover such insurance periods, is suspended by the provisions of Annex G I A 2 and Annex V B 1 (b) of those regulations, within the limits which they lay down. Both the observations of the Bundessozialgericht and the question referred to the Court itself are based upon the implied condition that Mr Fossi's right to pension falls within the territorial area of application of Regulations Nos 3 and 1408/71.

Neither of those regulations contains any express general reference to the territorial area of application and thus neither replies to the questions raised by requiring that, in order for past insurance periods to be considered, they should have been completed in the territory of the Member State in question. The only finding which may be made is the general one that the area of application of Community law is limited to the territories of the Member States. Thus the reply can only be found in the general principles contained in Articles 48 to 51 of the EEC Treaty. It might be

maintained that the Member States remain free to decide the scope of social benefits, since Article 51 refers expressly to the aggregation of all periods taken into account under the laws of the several countries. It is possible to counter that argument by stating that the freedom to lay down social security provisions which is available to the legislatures of the Member States must not include the power to determine the area of application of Community law. That would, however, be the case if, by taking account under its national legislation of insurance periods completed outside the Community, a Member State could, by unilateral action, transform them into insurance periods within the meaning of Community law and thus give rise to legal consequences detrimental to other Member States.

In that context it is interesting to note that in its statement of reasons for Annex V B 1 (b) of Regulation No 1408/71, the Commission made the following statement (Document No V/3209 of the Bundestag of 26 July 1968):

'It must be emphasized that in this instance the facts arose and the periods were completed outside the territorial area of application of the regulation.'

The opinion delivered by Mr Advocate-General Mayras in Case 14/72 *(Heinze* v *Landesversicherungsanstalt Rheinprovinz),* 15/72 *(Land Niedersachsen* v *Landesversicherungsanstalt)* and 16/72 *Allgemeine Ortskrankenkasse Hamburg* v *Landesversicherungsanstalt Schleswig-Holstein)* ([1972] ECR 1117) takes the same view.

Finally, the question of the territorial area of application of the regulations at issue can only be answered by reference to the aims of Articles 48 *et seq.* of the EEC Treaty. The movement of the plaintiff in the main action involved a territory situated outside the Community and, furthermore, Mr Fossi did not make use of his freedom to move within the Community.

Secondly, the Commission considers the questions which arise when preference is given to a wider interpretation of the matters covered. For example, in the abovementioned Case 187/73, the Court of Justice found that the question whether a benefit falls within the area of social security depends chiefly on the absence of any clearly-defined legal right, in conjunction with the grant of the benefit on the basis of an individual assessment. As regards the plaintiff in the main action, the important factor is not the right to the benefit but the payment which, whilst acknowledging the right in principle, the Reichsknappschaftsgesetz makes conditional upon the assessment made by the competent social insurance institution.

The natural consequence of integration, that is, of belonging to the community of insured persons in the territory of the Federal Republic, appears to be that the insured person must have formed close links with the legal invalidity and pensions insurance organizations in the territory of the Federal Republic, in order to be able to claim a right to benefits. It is in accordance with the aim of the law that the pensions payable in respect of insurance periods completed outside the area of application of the Reichsknappschaftsgesetz are only paid where the person entitled thereto is permanently resident within the Federal Republic of Germany, that is, where he has joined the national community of insured persons.

The Commission emphasizes that if preference were given to a wide interpretation of the regulations, a view which forms the basis of the study of their area of application, it would be necessary, for example, to reply to the question referred that the rule of equality of treatment laid down in Article 8 of Regulation No 3 and Article 3 (1) of Regulation No 1408/71 does not apply for the purposes of the implementation of the national legislation referred to in the abovementioned annexes and

governing the payment of pensions to persons entitled thereto who reside outside the Federal Republic of Germany, in so far as such payment is left to the discretion of the competent institution and is based upon an individual assessment of the particular facts of the case.

On the other hand, if, as the Commission prefers, the two regulations in question are interpreted as being limited to insurance periods completed within the Community the reply to the question referred to the Court might be as follows:

'The rule of equality of treatment laid down in Article 8 of Regulation No 3 and Article 3 (1) of Regulation No 1408/71 does not apply for the purposes of the implementation of the national legislation referred to in Annex G I A 2 of Regulation No 3 and Annex V B 1 (b) of Regulation No 1408/71 and governing the payment of pensions to persons entitled thereto who reside outside the territory of the Federal Republic of Germany.'

The Government of the Federal Republic of Germany, represented by Professor K. Jantz and M. Seidel, acting as Agent, and the Commission of the European Communities, represented by N. Koch, acting as Agent, presented oral argument at the hearing on 1 February 1977.

The Advocate-General delivered his opinion at the hearing on 8 March 1977.

Decision

1 By order of 29 June 1976, received at the Court Registry on the following 6 August, the Bundessozialgericht referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 8 of Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers (JO 1958, p. 561) and of Article 3 (1) of Regulation 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 (OJ, English Special Edition, 1971 (II), p. 416).

2 The question arose within the context of an action concerning the right of the plaintiff in the main action, an Italian national residing in Italy who worked from 1 June 1942 to 1 July 1943 in a mine in the Sudetenland, which was at that time part of the former German Reich, to a pension payable under German legislation on the ground of total disablement.

During that period the plaintiff was subject to the compulsory invalidity and pensions insurance scheme of the then competent social security institution for mineworkers in the Sudetenland (the Sudetendeutsche Knappschaft) (Sudeten German Mineworkers' Association) which was governed by the Reichsknappschaftsgesetz (law of the Reich governing social security for mineworkers, hereinafter referred to as 'the RKG').

In 1958 the plaintiff in the main action was awarded an invalidity pension by the competent Italian institution on the basis of insurance periods which he had completed in his country of origin. On 1 February 1970 he applied to the Bundesknappschaft, the mineworkers' insurance fund for the Federal Republic of Germany, for a pension.

The Bundesknappschaft, the defendant in the main action, which is required to assume certain of the obligations incumbent upon the mineworkers' social security institutions in existence before 1945, awarded the pension applied for but refused to pay it on the ground that since the plaintiff had only worked and completed insurance periods outside the Federal Republic of Germany and was residing outside that territory, it was 'suspended under Paragraphs 105 *et seq.* of the [amended] RKG', (Imperial Law governing social security for mineworkers).

The Bundesknappschaft maintains that the suspension is not incompatible with the prohibition contained in Article 10 (1) of Regulation No 1408/71, since Annex V B 1 b to that regulation provides for an exception to that prohibition in cases such as the present, whilst the plaintiff maintains that the exception is incompatible with Articles 48 *et seq.* of the EEC Treaty and that the refusal of the Bundesknappschaft results in discrimination against foreign nationals.

3 The question asks whether 'an Italian national living in Italy who at no time had lived or worked in the territory of the Federal Republic of Germany or of West Berlin, is to be treated, by virtue of Article 8 of Regulation No 3 and of Article 3 (1) of Regulation (EEC) No 1408/71 on the same footing as a German national when applying Paragraph 108 c of the RKG, so far as concerns insurance periods which were completed before 1945 with the Reichsknappschaft (the competent social security institution for mineworkers) under the law of the Reich outside the territory of the Federal Republic of Germany or West Berlin'.

4 The reply to be given to the question referred to the Court depends on whether a provision such as Paragraph 108 c of the RKG is covered by Regulation No 3 and Regulation No 1408/71 as legislation on social security.

5 In order to facilitate the economic and social integration of refugees and persons deported who could no longer enjoy their rights to insurance because the competent institutions no longer existed or were situated outside the territory of the Federal Republic of Germany, the Fremdrenten- und

Auslandsrentengesetz of 1953 (Law on substitute pensions and pensions awarded to certain categories of persons residing abroad) took responsibility under certain conditions for the rights of the parties concerned, whether or not they were German nationals.

Under the terms of that law as amended by the RKG of 1960, payment of such pensions is to be suspended if the person entitled thereto is habitually resident outside the territory of the Federal Republic of Germany.

6 The German provision which states that the benefits are not in the nature of social security is not decisive as regards Community law.

Legislation which confers on the beneficiaries a legally defined position which involves no individual and discretionary assessment of need or personal circumstances comes in principle within the field of social security within the meaning of Article 51 of the Treaty and of Regulations Nos 3 and 1408/71.

7 However, in the light of the facts that the competent insurance institutions to which the persons referred to in the provision in question had been affiliated no longer exist or are situated outside the territory of the Federal Republic of Germany and that the purpose of the German legislation in question is to alleviate certain situations which arose out of events connected with the National Socialist régime and the Second World War and, finally, that the payment of the benefits in question to nationals is of a discretionary nature where such nationals are residing abroad, those benefits are not to be regarded as in the nature of social security.

That conclusion is, moreover, confirmed by the reservation contained in Annex G I A 2 of Regulation No 3 and in Annex V B 1 (b) of Regulation No 1408/71.

8 The answer must therefore be that Article 8 of Regulation No 3 and Article 3 (1) of Regulation No 1408/71 do not apply to benefits such as those provided for in Paragraph 108 (c) of the Reichsknappschaftsgesetz in respect of insurance periods completed before 1945 outside the territory of the Federal Republic of Germany and of West Berlin.

Costs

9 The costs incurred by the Government of the Federal Republic of Germany, the Government of the Italian Republic and the Commission of the European

Communities, which have submitted observations to the Court, are not recoverable.

As these proceedings are, in so far as the parties to the main action are concerned, a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT

in answer to the question referred to it by the Bundessozialgericht by order of that court of 29 June 1976, hereby rules:

'Article 8 of Regulation No 3 and Article 3 (1) of Regulation No 1408/71 do not apply to benefits such as those provided for in Paragraph 108 (c) of the Reichsknappschaftsgesetz in respect of insurance periods completed before 1945 outside the territory of the Federal Republic of Germany and West Berlin.'

Kutscher Donner Pescatore Mertens de Wilmars Sørensen

Mackenzie Stuart O'Keeffe Bosco Touffait

Delivered in open court in Luxembourg on 31 March 1977.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE-GENERAL WARNER DELIVERED ON 8 MARCH 1977

My Lords

This case, like Case 87/76 *Bozzone* v *Office de Sécurité Sociale d'Outre-Mer,* on which Your Lordships are to hear the opinion of Mr Advocate-General Capotorti tomorrow, raises important questions of interpretation of Council Regulation No 3, concerning social security for migrant workers, and of