1. Benefits intended to help families to meet the cost of supporting their children aged over 16 but under 21 who are unemployed fall within the definition of 'family benefits' in Article 1(u)(i) of Regulation No 1408/71.

2. The purpose of Article 73 of Regulation No 1408/71 is to prevent a Member State from being able to refuse to grant family benefits on account of the fact that a member of the worker's family resides in a Member State other than that providing the benefits. Such a refusal could deter Community workers from exercising their right to freedom of movement and would therefore constitute an obstacle to that freedom. It follows that a condition of entitlement to certain family benefits whereby a worker's child must be registered as unemployed with the employment office of the Member State providing the benefits, a condition which can be fulfilled only if the child resides within the territory of that State, comes within the scope of Article 73 and must therefore be considered to be fulfilled where the child is registered as unemployed with the employment office of the Member State in which he resides.

REPORT FOR THE HEARING
delivered in Case C-228/88 *

I — Facts and written procedure

Giovanni Bronzino, an Italian national, has been employed for several years in Augsburg (Federal Republic of Germany). His wife Assunta and his children reside at Ercolano (province of Naples, Italy). He has received family allowances from the Kindergeldkasse (Child Benefit Fund) since January 1985 in respect of his children Nicola, Salvatore, Nino and Anna, born in 1968, 1969, 1974 and 1982 respectively.

In March 1985 Mr Bronzino applied for family allowances also in respect of his children Rosa, Nunzia and Vincenzo, born on 14 August 1964, 7 June 1966 and 2 July 1967 respectively. He produced various certificates from the Ercolano employment office dated January and February 1985 showing that Rosa, Nunzia and Vincenzo had been registered there as trainees or workers seeking employment (unemployed persons) since 16 August 1984, 16 April 1982 and 8 January 1985 respectively.

By decision of 11 April 1985, the defendant rejected the application. It relied essentially on the fact that under Article 2(4) of the Bundeskindergeldgesetz (Federal Law on Child Benefit, hereinafter referred to as 'the BKGG'), children over 16 years of age

* Language of the case: German.

cannot qualify unless they are in the national territory to which the BKGG applies, are seeking employment and are at the disposal of the employment office.

By judgment of 21 August 1986, the Sozialgericht (Social Court) Augsburg upheld the plaintiff's application, annulled the defendant's decisions and ordered the defendant to pay the plaintiff family allowances in respect of Rosa, Nunzia and Vincenzo. The Sozialgericht gave leave to appeal against its decision, which was based on the ground that the requirement that the plaintiff should transfer his children's residence to Germany in order to qualify for the allowances in question was contrary to the Grundgesetz (Basic Law) and to Article 73(1) of Regulation No 1408/71.

The defendant appealed to the Bayerisches Landessozialgericht which, taking the view that the relevant provisions of German law stated clearly and unequivocally that the allowances provided for therein could not be granted to persons seeking training or employment and residing in other Member States of the Community, raised the question whether such provisions were compatible with Articles 3(1) and 73(1) of Regulation No 1408/71. If the fiction provided for in the latter article extends to requirements which, as a general rule, are connected with residence (for example, registration as a person seeking work) and it is not open to the Member States to create certain rights limited to the national territory, the Community provisions must apply by virtue of the primacy of Community law.

In view of the foregoing considerations, the Bayerisches Landessozialgericht decided to stay the proceedings and to ask the Court of Justice to give a preliminary ruling on the following question:

'Are Articles 73(1) and 3(1) of Regulation (EEC) No 1408/71 or other provisions of Community law to be interpreted as meaning that a migrant worker is entitled to family benefits in the State of employment even when the family member is only registered as unemployed and available for work in the State of residence and under that State's rules, or cannot begin or continue vocational training there because of a lack of places in training schemes, whereas the national law of the State of employment demands that these preconditions be fulfilled in its territory?'

The order for reference was received at the Court Registry on 8 August 1988.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted by Giovanni Bronzino represented by Luciano Fazi, Sozialsekretär, by the Commission of the European Communities represented by Jürgen Grunwald, a member of its Legal Department, acting as Agent, by the Government of the Federal Republic of Germany represented by Martin Seidel and Meinhard Hilf, acting as Agents, by the Netherlands Government represented by Henri Johan Heinemann, Assistant Secretary-General in the Ministry of Foreign Affairs, by the Portuguese Government represented by Luís Inez Fernandes and Sebastião Pizarro, Director of the Legal Department of the Directorate-General for the European Communities and

Assistant Director of the Department of International Relations and Social Security Conventions, respectively, and by the Italian Government represented by Luigi Ferrari Bravo, Head of the Legal Department at the Ministry of Foreign Affairs, acting as Agent, assisted by Pier Giorgio Ferri, avvocato dello Stato.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry and, at the request of the Federal Government, assigned the case to the full court (Article 95(2) of the Rules of Procedure).

II — The applicable German legislation

Since 1 January 1985, Article 2(4) of the BKGG has been worded as follows:

'Children who are aged over 16 but under 21 shall also be taken into consideration where, within the territory covered by the law,

(1) they cannot begin or pursue vocational training in the absence of vacancies, or

(2) they are at the disposal of the employment office as unemployed persons.

This provision shall not apply to children who receive at least DM 400 every month

(1) in current benefits on account of invalidity or unemployment,

(2) in interim benefits under the pension scheme for public officials or members of the armed forces, or

(3) by reason of paid employment, after taking into account tax and other statutory deductions.

Article 2(a) and the second sentence of Article 3 shall apply by analogy.'

According to the grounds on which that measure is based and which are relied upon by the Federal Government,

'the lack of places at training centres and the state of the job market may lead to a situation in which young people are either unable for the time being to complete the vocational training envisaged and cannot find employment in the intervening period or cannot find employment after completing their vocational training. Where those young people — who have generally attained the age of majority — have not yet become affiliated, in view of their previous employment record, to the benefits scheme established by the Arbeitsförderungsgesetz (Law on the Promotion of Employment) so as to qualify for unemployment benefits or assistance, they remain as a rule financially dependent on their parents in the same way as young people still undergoing training. Parents should therefore receive family allowances in respect of those children even if they are aged over 18 as in the case of young people still undergoing training. These rules, which supplement the legislation on family allowances, apply primarily

to young people who on completion of their general school education are unable either to secure a place on a course of study or to obtain an apprenticeship or to find employment. Hence only young people who are at the disposal of the employment office are guaranteed entitlement to family allowances'.

III — Summary of the written observations submitted to the Court

Mr Bronzino points out that the German family allowances provided for by the BKGG and paid even at the end of the child's 16th year are family benefits designed 'to meet family expenses' (Article 1(u)(i) of Regulation No 1408/71) and must therefore be granted independently of the children's place of residence. There is no exception, or specific provision relating to children seeking employment, either in the declaration of the Federal Republic of Germany or in Annex VI to Regulation No 1408/71.

The Court has stated on several occasions that the Community principle of equal treatment (laid down in Article 7 of the EEC Treaty and Article 3 of Regulation No 1408/71) 'prohibits not only overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result' (most recently in its judgment of 15 January 1986 in Case 41/84 *Pinna* [1986] ECR 1, at p. 25). Article 2(4) of the BKGG — even though it applies irrespective of the nationality of the worker and of the members of his family — is essentially concerned, in view of its nature, with workers who are nationals of another Member State, whose family has remained in the country of origin and who must provide for its maintenance with the income earned in the country of employment.

According to the Commission, it is apparent from the wording of Article 73(1) of Regulation No 1408/71 that the fact that the members of a worker's family reside in a Member State other than the competent State cannot prevent entitlement to the family benefits in question from being acquired or maintained.

The aim of that provision is to protect workers and their relatives from the disadvantages which may result from the fact that they exercise their right to freedom of movement and work or have worked in different Member States. Registration with a German employment office as a person seeking employment or as an unemployed person, upon which Article 2(4) of the BKGG makes the acquisition and maintenance of entitlement to family allowances dependent, constitutes one of those disadvantages and can be neutralized only if registration in another Member State as a person seeking employment is assimilated to registration in the Member State responsible for granting the benefit applied for. The situation which arises here is similar to that of workers' children who study or undergo vocational training in a Member State other than the competent State.

The reasons for the maintenance of entitlement to family benefits in respect of children who pursue their studies or vocational training in a State other than the State responsible for paying the benefits also apply where children are registered in another Member State as unemployed. In both cases the benefits are necessary in

order to help families to meet the considerable financial expenses involved in educating the children and enabling them to take up an appropriate occupation. Evidence of a person's availability for work on the job market in another Member State may also be furnished by means of an appropriate attestation.

The principle of equal treatment also requires registration as a person seeking employment or as an unemployed person in a Member State other than that which provides the family benefits to be regarded as equivalent. The contested requirement that a person seeking employment has to register with a German employment office must be regarded as disguised discrimination since it excludes precisely migrant workers from abroad from enjoying continued entitlement to family benefits. Although the unemployed children of German workers to whom Article 2(4) of the BKGG applies have their habitual abode in the Federal Republic of Germany and may therefore register with a German employment office as persons seeking employment, that is not so in the case of unemployed children of migrant workers from abroad where they reside in their country of origin.

It is apparent from the statistics on family allowances submitted by the family allowances fund of the Bundesanstalt für Arbeit, broken down according to whether the children's place of residence is within or outside the Federal Republic of Germany, that at the end of 1984 more than 17% of the children of nationals of other Member States residing in Germany and entitled to German family allowances lived abroad, whereas German nationals whose children resided abroad accounted for only 0.03% of all Germans entitled to family allowances. Those figures illustrate conclusively the discriminatory effects of Article 2(4) of the BKGG.

The argument to the effect that the system established by Article 2(4) of the BKGG is consistent with the general principle of promoting employment and enables the employment office to bring young people into the mainstream of vocational training or to find work for them is not persuasive. Although that argument may justify the imposition of a comparable condition with regard to the grant of unemployment insurance benefits, such considerations are entirely irrelevant with regard to the family benefits at issue here and cannot therefore justify unequal treatment.

Clearly, the grant of family allowances is aimed at providing families with the financial assistance they need in order to meet the considerable expenses involved in educating and bringing up the children. As Article 2(4) itself states, that need to provide families with financial assistance exists throughout the period in the children's lives which precedes the time of their taking up employment, and regardless of the Member State in which they live.

The Federal Government points out that the benefits paid under the BKGG are classic social benefits granted as part of a family welfare policy and were duly notified by the Federal Government in accordance with Article 5 of Regulation No 1408/71.

The rules in question are based on the fact that, as a result of their previous employment record, some young people have not yet become affiliated to the benefits scheme established by the Arbeitsförderungsgesetz with a view to qualifying for unemployment benefits or assistance. Article 2(4) of the BKGG is designed to fill that gap. The classification of that benefit as a family allowance under a family expenses equalization scheme is explained by the fact that young people who are unemployed and who are not entitled to unemployment benefits or assistance are generally dependent on their parents.

The benefits in question are therefore determined by the critical situation of young people on the job market at present; they cease to qualify for benefits once they are offered employment, and the legislature is entitled to discontinue payment if it considers that the state of the job market is characterized by a degree of stability comparable to that which existed before 1976.

The conditions referred to in Article 2(4) of the BKGG, which require the presence within national territory of the person seeking employment, are explained by the fact that the Federal authorities cannot offer such a person either a place on a training scheme or employment unless that person is at the disposal of the careers advisory service or employment office in the Federal Republic of Germany. Moreover, the employment office in another Member State has no particular reason rapidly to find work for the person concerned ahead of others since it knows that person to be in receipt of benefits which it does not have to pay out itself. It may therefore be tempted, instead, to offer employment to other job-seekers who do not qualify for comparable benefits.

The aim of promoting employment pursued by the legislature therefore justifies the connection between the grant of those benefits and the claimant's presence within national territory, as provided for by Article 2(4) of the BKGG.

According to the Federal Government, Article 73(1) does not cover all the benefits granted in the form of family allowances but only 'family benefits' which can normally be regarded as benefits intended to meet family expenses within the meaning of Article 4(1)(h) in conjunction with Article 1(u)(i) of Regulation No 1408/71. Family benefits of the usual kind are granted irrespective of the place of residence or habitual abode of the children provided that the worker concerned has his habitual abode in the State which pays the benefits. Such benefits are dependent not on the state of the job market but on the existence of conditions which as a rule reflect a social burden on the worker's family (for instance, vocational training, school education or a handicap). Those conditions can be met in respect of the children, even if they are abroad.

In its case-law, the Court of Justice has assessed financial benefits not by reference to their formal classification but by reference in each case to the objective actually pursued by the benefit in question: judgment of 20 June 1985 in Case 94/84 *Deak* [1985] ECR 1873, paragraph 15, according to which a temporary allowance granted to a young person who is unemployed does not constitute a family benefit; judgment of 4 June 1987 in Case 375/85 *Campana* [1987] ECR 2387, paragraphs 9

to 12), in which the Court refused to treat as 'unemployment benefits' within the meaning of Article 4(1)(g) of Regulation No 1408/71 all social benefits in the broad sense granted for reasons connected with employment policy; and the judgment of 27 September 1988 in Case 313/86 *Lenoir* [1988] ECR 5391, paragraphs 11 and 16). In those judgments, the Court drew a distinction with regard to family benefits according to whether their general purpose is to meet family expenses or their grant is connected with specific conditions which cannot be fulfilled except within national territory, that is to say in a given social environment.

It follows that since the benefits in question are family allowances only in the formal sense, they are not covered by Article 73(1) of Regulation No 1408/71. According to the case-law of the Court, that regulation cannot be applied to cases which have manifestly not yet been resolved under Community law as it stands at present. In support of that proposition, the Federal Government refers to the judgment of 9 July 1975 in Case 20/75 *D'Amico* [1975] ECR 891, in which the Court did not take account of a period of unemployment in France (for the purposes of entitlement to early retirement in the Federal Republic of Germany), and to the judgment of 12 July 1979 in Case 266/78 *Brunori* [1979] ECR 2705, in which the Court did not take account of an insurance period completed in Italy (for the purposes of exemption from compulsory insurance in Germany for craftsmen).

According to the Federal Government, the prohibition of discrimination on grounds of nationality, which is laid down by Article 3(1) of Regulation No 1408/71, is inapplicable in this case. It is only because his children are registered in Italy and not in the Federal Republic of Germany with the employment office responsible for implementing certain measures under the Arbeitsförderungsgesetz that the plaintiff in the main proceedings cannot rely on the right in question. Those considerations have nothing to do with the nationality of the plaintiff or his children. Even if the plaintiff or his children were German nationals, they would still not be entitled to those family allowances if the children were registered as unemployed in another Member State since the conditions laid down by Article 2(4) of the BKGG would not be fulfilled in that case either.

Nor does Article 2(4) of the BKGG constitute disguised discrimination prohibited by Community law, since it is justified on grounds connected with employment policy.

Furthermore, disguised discrimination on grounds of nationality arises only in cases where, in principle, foreigners alone are affected by the provision in question. Although it is indisputable that far more children of foreign nationals than children of German nationals live abroad and that, consequently, the conditions laid down by Article 2(4) of the BKGG affect primarily the former, even the children of German families may stay abroad without interruption.

Any other concept of disguised discrimination would be inconsistent with the case-law of the Court, according to which the prohibition of discrimination on grounds of nationality does not apply where all the conditions for the acquisition of a right are fulfilled in another Member State (judgment of 24 April 1980 in Case 110/70 *Coonan* [1980] ECR 1445, paragraph 6).

According to the Federal Government, Community law does not require the extension to the territory of other Member States of measures designed to promote employment. Article 48 of the Treaty seeks merely to ensure that all workers employed in a Member State benefit from general measures of mutual assistance, and Article 51, whose aim is to promote the free movement of workers, cannot be interpreted as laying down that all the conditions for entitlement to a social security benefit may also be fulfilled abroad.

Regulation No 1408/71 imposes restrictions, with regard to employment measures, on the recognition of events which occurred abroad (Articles 67 to 71), which in the Court's view is compatible with Article 51 of the Treaty. It follows from those provisions that the fact that a worker places himself at the disposal of the employment office of another Member State cannot be equated with the fact of placing himself at the disposal of the employment office of the State in which he claims entitlement to a social benefit granted under the policy on employment.

The Italian Government maintains that a legislative provision according to which forfeiture or reduction of a worker's rights follows from the fact that a member of his family is not resident in the country in which the worker is employed constitutes a discriminatory clause to the detriment of the worker in his capacity as a person exercising the right to freedom of movement within the Community.

According to the Italian Government, if it were considered essential to register with an employment office or to attend a vocational training course in Germany, the German provision in question would assume a specific connotation, enabling it to be assimilated to a 'residence clause'. If a rule requires the adoption — as a condition for the acquisition or maintenance of a right — of certain conduct which it is impossible in practice to engage in except in the place where the person concerned is resident, and if that rule also prescribes the place where such conduct must be engaged in, the rule must be regarded as a disguised residence clause.

Consequently, a national provision of that kind must perforce be overridden by Article 73(1) of Regulation No 1408/71, inasmuch as it renders the place where a member of the worker's family resides wholly irrelevant for the purposes of the grant of allowances.

The principle of territorial assimilation can also be applied to the protection of migrant workers (judgment of 15 October 1969 in Case 15/69 *Ugliola* [1969] ECR 363, on consideration of military service).

The Netherlands Government maintains that a worker and the members of his family must, in order to acquire entitlement to family benefits, satisfy in full the conditions laid down by the legislation of the country in which the worker is employed, on the understanding that only residence requirements relating to members of the family are overridden by the recognition of notional residence.

Where entitlement to family allowances in respect of unemployed members of a worker's family is subject to the requirement that they must be registered with an employment office in the country in which

the worker is employed as persons seeking employment, the rule of notional residence laid down in Article 73(1) does not in any way impose an obligation to treat registration with an employment office in another Member State as equivalent to registration with an employment office in the country in which the worker is employed. Nor is such an obligation laid down by any other provision of Community law.

The Portuguese Government maintains that the fact that the children of a migrant worker reside in another Member State can be equated with residence in the competent Member State. That is unequivocally laid down by Community law on grounds connected with the effective protection of the principle of freedom of movement for workers (Article 48 of the Treaty as supplemented by secondary legislation) and with the observance of the principle of equal treatment in social security matters (Article 51 of the Treaty as supplemented by secondary legislation).

The argument to the effect that registration with an employment office situated within the territory of the competent Member State is required both for nationals of that State and for nationals of other Member States employed there is only apparently consistent with the principle of equal treatment laid down by Regulation No 1408/71. The difficulties involved in satisfying the conditions governing registration with the employment office of the competent State penalize the children of migrant workers who reside within the territory of another Member State far more severely. This state of affairs leads ultimately to covert discrimination which has been criticized on several occasions by the Court of Justice (see, for instance, the judgment of 15 January 1986 in Case 41/84 *Pinna* [1986] ECR 1).

J. C. Moitinho de Almeida
Judge-Rapporteur