JUDGMENT OF THE COURT (FIRST CHAMBER)
13 NOVEMBER 1984 [1]

F. A. Salzano
v Bundesanstalt für Arbeit — Kindergeldkasse
(reference for a preliminary ruling from the Sozialgericht München)

(Social security — Family allowances — Suspension of the right to benefits)

Case 191/83

Social security for migrant workers — Family benefits — Community rules against overlapping benefits — Suspension of entitlement to benefits in the State of employment — Benefits payable under the legislation of the State in which members of the family live — Conditions

(Regulation No 1408/71 of the Council, Arts 73 and 76)

There is no suspension of the entitlement to family allowances payable in pursuance of Article 73 of Regulation No 1408/71 in the country of employment of one of the parents when the other parent resides with the children in another Member State and pursues there a professional or trade activity but does not receive family allowances for the children, the reason being that not all the conditions laid down by the legislation of that Member State for the actual receipt of such allowances are satisfied.

In Case 191/83

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

F. A. SALZANO, Munich,

and

BUNDESANSTALT FÜR ARBEIT — KINDERGELDKASSE [Federal Employment Office, Child Allowance Department]

1 — Language of the Case: German.

on the interpretation of Article 76 of Regulation No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT (First Chamber)

composed of: G. Bosco, President of Chamber, A. O'Keeffe and T. Koopmans, Judges,

Advocate General: M. Darmon
Registrar: D. Louterman, Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of 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 Salzano is of Italian nationality. He has been employed and resident in Germany since May 1979. Mrs Salzano lives with their three children in Italy.

On 11 July 1979 Mr Salzano applied to the Bundesanstalt für Arbeit for the grant of family allowances for his three children resident in Italy. The allowances in question were refused for the period from 1 May 1979 to 31 December 1979 because, according to the defendant in the main action, Mrs Salzano had worked during that period and because of her employment was entitled to family allowances under Italian law. According to Article 76 of Regulation No 1408/71 entitlement to family allowances must be suspended if, by reason of the pursuit of a professional or trade activity, family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing.

Mr Salzano brought proceedings against the decision refusing his application before the Sozialgericht which, by order of 22 July 1983, referred the following question to the Court for a preliminary ruling under Article 177 of the Treaty:

"Is Article 76 of Regulation No 1408/71 of the Council of 14 June 1971 to be interpreted as meaning that entitlement to family allowances must be suspended (if so, to what extent), in the country in which one of the parents is employed, also in the case where the other parent resides with the children in another Member State (country of residence) and there pursues a professional or trade activity, but does not receive any family allowances for the children because there is no application by one parent and/or waiver by the other parent as required by the domestic law so that it is not clear whether and to what extent the parent in the country of residence of the children is entitled to family allowances?"

The order making the reference was received at the Court Registry on 12 September 1983.

In the grounds of the order making the reference the national court observes that according to the national law of the Federal Republic of Germany the plaintiff is not entitled to the family allowances (Kindergeld) since his children have neither their residence nor their usual place of abode within the territory in which the Bundeskindergeldgesetz [Federal Law on Family Allowances] applies (Paragraph 2 (5) of the Bundeskindergeldgesetz). The plaintiff's right to German family allowances arises under superior Community law since under Article 73 (1) of Regulation No 1408/71 his children are to be treated as though they were residing in the territory of the Federal Republic of Germany.

Under Article 76 of the regulation, however, entitlement under Article 73 is to be suspended if, by reason of the pursuit of a professional or trade activity, family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing.

In this regard the parties are at issue first of all on the interpretation of the word "suspend" and above all on the question whether the plaintiff's right to family allowances must be suspended under Article 76 of the regulation since it is not clear how the word "payable" in Article 76 is to be interpreted.

The Court of Justice has already considered that problem in two judgments (Case 134/77 *Ragazzoni* [1978] ECR 963 and Case 100/78 *Rossi* [1979] ECR 831). Each of those judgments however concerned facts which predated the entry into force of the Italian Law No 903 of 9 December 1977 [1] on equal treatment for men and women according to which:

"Family benefits, family allowances and pension increases for dependent members of the family may, in the alternative, be paid to the wife who is in paid employment or in receipt of a pension on the same conditions and subject to the same limits as those which apply to a male worker who is in paid employment or in receipt of a pension. In the event of application by both parents the family benefits, family allowances and pension increases for dependent members of the family shall be paid to the parent with whom the child is living".

In view of that state of the law the defendant starts from the premise that the mother of the children satisfies all the substantive conditions for entitlement to family allowances. It does not matter whether in Italy the exercise of the right

1 — Gazzetta Ufficiale della Repubblica Italiana of 17. 12. 1977, No 343.

requires an application to that effect by the mother and a declaration of waiver. They are simply formal requirements.

The national court is inclined to adopt the plaintiff's view according to which there is suspension under Article 76 of the regulation only if all the conditions for the payment of the family allowances are in fact satisfied in the country of residence of the children, that is to say, where there is also an appropriate application and, if necessary, a declaration of waiver by the other parent.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the European Community written observations were lodged by the plaintiff in the main action, Mr Salzano, represented by J. Stahlberg, Rechtsanwalt of Munich, the Government of the Federal Republic of Germany, represented by M. Seidel and E. Röder, acting as Agents, the Italian Government, repesented by O. Fiumara, Avvocato dello Stato and the Commission of the European Communities, represented by M. Beschel, a Member of its Legal Department, assisted by B. Schule of the Max-Planck-Institut für Ausländisches und Internationales Sozialrecht, Munich.

On 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.

Pursuant to Article 95 (1) and (2) of the Rules of Procedure the Court, by order of 11 April 1984, assigned the case to the First Chamber.

II — Written observations

The *plaintiff in the main action* considers that there can be suspension of entitlement to family allowances only in the event of actual payment or at least where all the formal or substantive conditions are satisfied (Case 134/77 *Ragazzoni* [1978] ECR 963).

Article 76 of Regulation No 1408/71 is not intended to prevent the overlapping of benefits which are not real but only fictitious.

Thus the condition which must be fulfilled for a suspension to come into operation is the actual payment of double benefits.

In the judgment in Case 100/78 *Rossi* [1979] ECR 831 relating to Article 79 (3) of the regulation which contains a scheme similar to Article 76 for pensioners the Court stated that suspension is applicable "only to the extent of the amount actually paid by virtue of the pursuit of a professional or trade activity". Suspension of entitlement to benefits

"is not applicable if the mother has not actually become entitled to those same allowances under the legislation of another Member State by virtue of her pursuit of a professional or trade activity, either because only the father is acknowledged to have the status of head of household or because the conditions for awarding to the mother the right to payment of the allowances have not been fulfilled".

In that case the Court made no distinction between formal and substantive conditions but Mr Advocate General Capotorti emphasized that suspension

"implies, of course, the need for an application from the wife and a declaration by the husband ... Until those conditions have actually materialized, it cannot be said that a working wife is entitled to payment of the allowances in respect of the children".

The municipal law of the country of residence and the jurisdiction of the competent authorities of that country must be fully accepted by the country of employment. According to Italian law grant of the allowance presupposes an application by the wife and a waiver by the husband.

If the competent authority of the country of residence does not consider itself to be in a position to rule upon an application, an authority of the country of employment cannot substitute itself for the first-mentioned authority and itself rule upon an application made against a body responsible for payment in another Member State.

The right of option, that is to say the right of the family itself to choose which of the spouses should make application for and receive the family allowances, exists in the Federal Republic of Germany as well as in Italy. That right is not affected by the provisions of Community social law designed to coordinate the national rules and must be accepted by the authorities of the country of employment. The fact that in practice the highest benefit is perhaps always chosen is in accordance with the principle of the most favourable treatment laid down in Regulation No 1408/71.

The fact that the wife works cannot entail a quasi-penalty in the form of depriving the migrant worker of family allowances. Article 76 of the regulation is intended to avoid the overlapping of allowances received by the migrant worker not with the wage or remuneration of the husband in the country of residence but with the allowances received by the wife.

As regards the second part of the question the plaintiff in the main action considers that he is entitled to the difference between the amounts of the allowances of the country of employment and the country of residence in the event of suspension under Article 76 of Regulation No 1408/71.

The Court held in the judgment in Case 104/80 *Beeck* [1981] ECR 503 in relation to Article 10 (1) (a) of Regulation No 574/72 that payment of family benefits or family allowances are suspended

"only up to the amount received, in respect of the same period and the same member of the family, in the State of residence by the spouse pursuing a professional or trade activity within the territory of that State".

The *Beeck* case was concerned with Article 10 of Regulation No 574/72 and not with Article 76 of Regulation No 1408/71. However, the difference between the two provisions relates not to the legal consequence but only to the legal conditions. The two provisions are intended to cover all the kinds of family benefits and allowances which are granted solely by virtue of the place of residence (Article 10 of Regulation No 574/72) or are granted there by reason of the pursuit of a professional or trade activity (Article 76 of Regulation No 1408/71).

The plaintiff in the main action considers that authority for those propositions is to be found in the *Rossi* case, Case 733/79 *Laterza* [1980] ECR 1915 and Case 807/79 *Gravina* [1980] ECR 2218.

As regards the problem of the basis of entitlement it is not a question of whether the benefit arises only under the municipal law or only as a result of the municipal law supplemented by Community law. In both cases it is protected as an acquired right.

Only in so far as it is a question of determining the amount is it necessary to make a distinction, for the purpose of calculating the difference, between the matters which have arisen in one or other Member State and brought about an increase in benefit. That has consequences for the calculation of an orphan's pension, for example, but not, as in the present case, on family

allowances which are independent of insurance periods.

The main idea underlying the plaintiff's legal argument is that the gainful employment of the spouse in the country in which the children reside ought not to bring about a situation in relation to family benefits which is less favourable than that which existed before the spouse took up gainful employment or which would exist in the absence of such employment. On the contrary the objective of Regulation No 1408/71 is precisely that families of migrant workers should acquire all the social rights available in a State irrespective of their nationality. To give effect to the contention of the defendant in the main action would lead to discrimination, in the first place where both parties work (and thus, in general, discrimination against the wife) and in the second place on grounds of nationality.

The *Government of the Federal Republic of Germany* considers that the first part of the question referred to the Court for a preliminary ruling should be answered in the affirmative.

That result follows from the wording of Article 76 of Regulation No 1408/71. Mr Advocate General Capotorti stated in his opinion in Case 134/77 *Ragazzoni* [1978] ECR 973 that the word "payable", which is used in Article 76, is not equivalent to the word "paid". On the other hand, "for the person concerned to be able to assert that right, all the conditions must in fact have been fulfilled."

Those conditions are solely substantive conditions which give rise to the right (for example the pursuit of a professional or trade activity and the existence of children) to the exclusion of formal conditions on which entitlement depends (for example the submission of an application and the waiver by the spouse of priority).

Only that interpretation accords with the spirit of the provision. The latter is concerned not only with avoiding the overlapping of benefits but also determines which right must be satisfied where a right exists in two Member States. In the event of entitlement in both Member States because of the pursuit of a professional or trade activity it is the Member State in which the children reside which must grant the benefit. The solution is based on the following consideration: where the parents contribute in both States to the national product of those States, pay taxes and, as the case may be, social security contributions, it is the State where the children reside which must provide family allowances since it has the greater responsibility for the children. The provision in question cannot however achieve that objective if it may be applied only in a case in which, apart from the substantive conditions, the formal conditions for entitlement are satisfied in the State where the children reside. Such an interpretation of the provision amounts to acknowledging that the parents have a right of option; they are free to choose which of the two Member States should pay.

The present case differs from the *Ragazzoni* case and Case 100/78 *Rossi* [1979] ECR 831. In those cases, under the legal provisions in force at the time in Italy, the State of residence of the children, the mother could not be regarded as head of household and thus was not entitled to family allowances.

Following amendment of the Italian legal provisions the mother in the present case must, however, be regarded as also entitled to claim family benefits in the State of residence of the children.

It is true that the Court in the said judgments based itself on satisfaction of the conditions giving rise to entitlement. That is not to be understood as also referring to formal conditions for entitlement including the submission of an application and the declaration of waiver by the other spouse. The Court

did not examine, in the grounds of those judgments, the problem of the submission of an application or that of the declaration of waiver. In view of the legal position at the time it was not necessary to consider such matters.

Regulation No 1408/71 excludes in principle the choice between family allowances in the country of residence and the country of employment. It is obvious that Article 76 provides no option of that kind. In such a case the Communtiy rule against overlapping should prevail over any national right of option.

With regard to the second part of the question the Federal Government contends that entitlement to family benefits must be suspended *in toto* in the country of employment.

According to Article 76 of Regulation No. 1408/71 and Article 10 (1) (a) of Regulation No 574/72 entitlement to family benefits is suspended or is not suspended; partial suspension is not provided for.

Under Chapter 7 of Regulation No 1408/71 family benefits and family allowances may be granted according to two different principles: that of the country of employment (Article 73 (1)) and that of the country of residence (Article 73 (2)). The authors of the regulation have thus not inferred from Article 51 of the EEC Treaty that it is the highest benefits which must always be granted. That decision by the authors of the regulation cannot however be compatible with an interpretation of Article 76 to the effect that the benefits defined according to the principle of the country of residence must always be raised to a level corresponding to that of the benefits determined according to the principle of the country of employment.

According to the established case-law of the Court inspired by the fundamental principle of free movement of workers and the purpose of Article 51 of the EEC Treaty a rule intended to avoid overlapping of family allowances must be restrictively applied: it is applicable only to the extent to which it does not, without cause, deprive those concerned of entitlement to benefits under the legislation of a Member State (Case 104/80 *Beeck* [1981] ECR 503). In order to avoid depriving a beneficiary of entitlement to benefits given by the national legislation it is therefore necessary, in conformity with that case-law, to apply the rule against overlapping only partially and to award the difference as a supplement where the amount of benefits the payment of which should be suspended is greater than the benefits to be paid.

In the present case the entitlement of the plaintiff to child allowances is based on Article 73 (1) of Regulation No 1408/71. That right, which is based on Community law, ceases to exist by virtue of Article 76. Application of that rule against overlapping does not constitute discrimination affecting the free movement of the plaintiff in the main action since he is deprived of no pre-existing right as a result of his activity in a Member State other than the State of residence of his family.

Nor do the judgments of the Court which dealt with similar legal questions relating to Chapter 8 of Regulation No 1408/71 (Case 100/79 *Rossi* [1979] ECR 831; Case 733/79 *Laterza* [1980] ECR 1915; Case 807/79 *Gravina* [1980] ECR 2205) yield a different solution. In those three cases the issue was one of the suspension of purely national rights. Moreover the fact that the overlapping

of rights had to be avoided by the suspension of one right was due to the fact that the beneficiaries had transferred their residence from the country of employment to Italy. In all three cases, unlike the situation in the present case, it was a question of ensuring the right to freedom of movement.

The *Italian Government* points out that in the present case, according to the Italian Law No 903 of 9 December 1977, the family allowances would have been paid to the mother of the minors resident in Italy if she were entitled thereto and provided that she had made a prior application for them. Apparently no application was made and no sum paid.

It is clear from the case-law of the Court in the *Ragazzoni* and *Rossi* cases that the suspension provided for by Articles 76 and 79 of Regulation No 1408/71 takes effect only if the allowances had actually been paid in the other State. That principle emerges even more clearly from the judgment in Case 149/82 *Robards* [1983] ECR 131.

Consequently the Italian Government considers that the answer to the question put by the German court can be only in the negative for since the wife did not make an application the allowances were not payable to her in Italy even if theoretically she was entitled thereto; the competent institution for paying allowances to the husband may not judge the wife's entitlement to the allowances according to the national law of her State of residence but must check only whether or not the allowances are actually paid there. That solution, which leaves the spouses the right to opt for the allowances which they are to receive nevertheless seems perfectly compatible with the Community rules and *a fortiori* with the national laws which in implementing equality of treatment between men and women in relation to work leave the spouses the right to choose which of the two allowances should be paid.

The second part of the preliminary question is of no interest if the first part is answered as above.

In the event of a different answer the Italian Government considers that the suspension can be effective only up to the amount actually paid in the other State. That solution arises from the principle of Community law according to which a rule against overlapping can have no effect other than to avoid duplication of benefits and that is why a benefit may not be taken away (or suspended) except for such part which is covered by a similar benefit (Case 22/77 *Mura* [1977] ECR 1699 and Case 236/78 *Mura* [1979] ECR 1819).

The *Commission* points out that the right to benefit acquired by the plaintiff in the main action under the German Law on family allowances arises from the combined provisions of Article 73 of Regulation No 1408/71 and the Federal Law on family allowances.

At the same time his wife may claim family allowances in Italy by virtue of Article 9 of the Italian Law of 9 December 1977.

The overlapping of two comparable benefits for one and the same child or children, which is an important factor in the main proceedings since the plaintiff's

wife is entitled to family allowances in Italy, is governed, as far as concerns entitlement to family allowances under Community law, by two different provisions against overlapping.

Whereas Article 10 of Regulation No 574/72 refers to entitlement to family allowances acquired in the State of residence of the child or children on the sole basis of residence, the overlapping of entitlement to family allowances in the State of employment with entitlement acquired in the State of residence as a result of the pursuit therein of a professional or trade activity is governed by Article 76 of Regulation No 1408/71. The latter provision against overlapping applies in the present case since the Italian provisions are based on the pursuit of a professional or trade activity.

Article 76 aims at preventing the overlapping of entitlements to family allowances acquired in different States. The rules take into account the fact that family benefits are intended to safeguard the family's standard of living by compensating to a certain extent for the additional needs which the family have to meet as the result of the expenses connected with the maintenance and education of children. Since the amount of those additional needs does not change according to whether only one or both spouses are working, the family allowances ought to be granted only once even if both spouses are working. On the other hand Article 76 is not to be interpreted as a rule of priority of Community law according to which entitlement to family allowances acquired in the State of employment must always be suspended once the other parent takes up a professional or trade activity in the State of residence. That follows also from the fact that Article 76 contemplates not only the pursuit of a professional or trade activity in the State of residence but requires in addition that as a result of the pursuit of that professional or trade activity family benefits or allowances are "payable" there (Case 134/76 *Ragazzoni* [1978] ECR 963).

In the aforesaid judgment the Court moreover took the view that for family allowances to be regarded as "payable" under the legislation of the Member State in whose territory the members of the family are residing the law of that State of residence must recognize the right to the payment of allowances in favour of the person in that family who works in that State. It is therefore necessary that the person working in the State of residence should fulfil all the conditions required by the domestic legislation of that State in order to be able to exercise that right.

In the main proceedings in the *Ragazzoni* case the plaintiff's wife could not be regarded as incontestably being a "head of household" under the Italian law in force at the time so that she could not claim in Italy the family allowances for the children and as a result no family benefit or allowance was "payable" pursuant to the legislation of the State of residence.

In his opinion Mr Advocate General Capotorti considered the legal position created in Italy by Article 9 of Law No 903 of 9 December 1977 according to which family allowances might in the event of application also be paid to the working wife. He observed in that respect that in the new legal situation the right to payment of family allowances arises, in the case of a woman married to a husband who works abroad and who in turn is entitled to dependent child

allowances, only where the employed wife, or perhaps both parents, submit a claim. No right whatever will arise if the claim for allowances is submitted by the father alone, for in that case "for the purposes of Article 76 of Regulation No 1408/71 the family allowances are *not payable* to the employed mother within the meaning of the said Article 9 of Law No 903 of 1977".

As a result the Sozialgericht Munich considered that in the absence of an application by the plaintiff's wife and a declaration by the plaintiff himself family allowances are not "payable" in Italy. That interpretation is justified on practical grounds: the competent institution in the country of employment is in practice unable to determine whether all the conditions laid down by the domestic legislation of the country of residence for the grant of family allowances are fulfilled. Thus it is still not established in the present case whether the plaintiff's wife, on the basis of part-time work for 51 days only, really satisfies the legal conditions in Italy for entitlement to family allowances. That question can be answered only after submission of an appropriate application by the wife and a declaration of waiver by the plaintiff.

An interpretation of Article 76 of Regulation No 1408/71 which does not take account of the existence of all the conditions, including formal conditions, to which the benefit of family allowances is subject in the State of residence exposes the migrant worker and members of his family to the risk, on the one hand, that his entitlement to family allowances in the State in which he is working may be suspended and, on the other hand, that it may not yet be certain that the benefits which may possibly be payable in the State of residence are in fact paid. Moreover the circumstances justifying the suspension of payment of the family benefits in the State of employment of the migrant worker might arise solely because of the pursuit of a professional or trade activity by the wife of the migrant worker in the State of residence, that is to say without his knowledge and concurrence.

That result would be contrary to the objective specifically laid down in respect of family benefits and allowances by Article 73 (1) of Regulation No 1408/71, implementing Article 51 of the EEC Treaty, according to which the establishment of free movement of workers in the field of social security should entail equality of the conditions applying to national and migrant workers of the Member States of the Community and consequently the assimilation of migrant workers of those States to national workers. The equating, for that purpose, of the place of residence of the members of the family of the migrant worker in another Member State with the place of residence in the State in which he is working is limited by Article 76 of Regulation No 1408/71 and Article 10 (1) of Regulation No 574/72 solely to avoid unjustified enrichment resulting from the overlapping of rights to family benefits and allowances in the State of employment and State of residence. That objective is achieved if entitlement to the benefits is suspended in the State of employment provided that all conditions for the grant are satisfied in the State of

residence; consequently if the State of residence makes the grant of benefits subject to an application it would be necessary for the prescribed application to have actually been lodged.

The Court of Justice considered comparable problems in Case 100/78 *Rossi* [1979] ECR 831 in relation to the interpretation of Article 79 (3) of Regulation No 1408/71.

Article 79 (3) provides for the suspension of benefits for dependent children of pensioners and for orphans if the children become entitled to family benefits or family allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity.

The Court considers that that rule against overlapping "has a purpose, and is applicable, only if entitlement to benefits actually arises and is acquired according to the legislation of the State in which the professional or trade activity is pursued" and that the suspension of entitlement to family allowances for dependent children of a father who is in receipt of a pension under the legislation of a Member State is not applicable "if the mother has not actually become entitled to those same allowances under the legislation of another Member State by virtue of her pursuit of a professional or trade activity, either because only the father is acknowledged to have the status of head of household or because the conditions for awarding to the mother the right to payment of the allowances have not been fulfilled".

In his opinion in that case Mr Advocate General Capotorti also thought that after the entry into force of Italian Law No 903 of 9 December 1977 the spouses might designate which of them should receive the family benefits or allowances; so long as that right of option has not been exercised by an application for family allowances by the wife and an appropriate declaration of waiver by the husband it cannot be said that the wife who pursued a professional or trade activity is entitled to payment of allowances for the children.

It must nevertheless be recognized that that interpretation gives the spouses the possibility of choosing between the family benefits and allowances of the State of employment and of the State of residence. Basically that option is attributable to the fact that it is ultimately pursuant to and in implementation of the Community provisions designed to give effect to the principle of equality of treatment between men and women that the national laws on family benefits and allowances give the two parents the possibility of choosing which of them should exercise the right.

It would be contrary to the principle of equality of treatment which is the basis of the rules laid down in Article 73 of Regulation No 1408/71 that the option granted by national law should be restricted by Community law in such a way that where the two spouses pursue a professional or trade activity the family benefits and allowances to be claimed in the State of residence have priority and must be applied for by the spouse working there, that is to say, in other words, that the wife pursuing a professional or trade activity in Italy would be required to apply for family allowances there and her husband would

be obliged to waive his entitlement and, therefore, his right to exercise his option.

Consequently the application of Article 76 of Regulation No 1408/71 basically depends on the way in which the spouses in fact use their right of option.

That reasoning accords with the objective of the provision against overlapping which is to prevent unjustified enrichment and moreover with the answer given by the Court in Case 149/82 *Robards* [1983] ECR 171 on the first sentence of Article 10 (1) (a) of Regulation No 574/72. According to that judgment the provision for suspension applies "whenever the institution of another Member State has in fact granted family benefits to a worker in respect of the same child, in pursuit of Article 73 of Regulation No 1408/71, without its being necessary to examine whether all the conditions for the grant of those benefits are satisfied under the legislation of that other Member State".

If for example the plaintiff's wife had made an application for family allowances in Italy and the plaintiff had lodged a corresponding declaration of waiver and if, as a result, the plaintiff's wife had obtained allowances in Italy, it would not be necessary to consider in the present case whether the occasional pursuit of a professional or trade activity by the wife in fact suffices to give rise to an entitlement to family allowances; entitlement to family allowances would have to be suspended.

On the other hand, in the present case, which is the converse of the case just described, since the conditions required before family allowances "are payable" are not in fact satisfied, there can accordingly be no suspension.

Should the Court decide to follow the Commission's view, the question of the amount up to which the entitlement acquired in the State in which the husband is employed must be suspended does not arise.

Moreover it is necessary to take account of the interpretation which the Court gave to Articles 77, 78 and 79 of Regulation No 1408/71 in Cases 100/78 *Rossi* [1979] ECR 831 and in Case 733/79 *Laterza* [1980] ECR 1915. According to those judgments when the amount of family allowances paid in the State of residence is lower than that of the benefits provided for by the legislation of the State of employment the worker is entitled, as against the competent institution of the State of employment, to a supplement equal to the difference between the two amounts.

Even though the applicable provisions of Community law, according to their literal wording, provide only for "suspension" of entitlement and not "partial suspension" or a "reduction" that solution is in accordance with the meaning and the purpose of the provisions against overlapping which are designed to prevent the unjustified enrichment of a migrant worker resulting from the grant of various family benefits and allowances in several Member States but are not intended to entail, in addition, a reduction in benefits. Such a reduction would moreover be contrary to the objective of Article 51 of the EEC Treaty and Regulations Nos 1408/71 and 574/72 which require, according to the case-law of the Court, that the Community rules should be applied in such a way as not to deprive the migrant

worker or his dependents of the benefits payable by virtue of the legislation of a Member State or of that legislation supplemented by Community law (Case 733/79 *Laterza* [1980] ECR 1915).

For the foregoing reasons the Court has expressly recognized the possibility of partial suspension of entitlement to family allowances acquired under Community law when interpreting the provision against overlapping contained in Article 10 (1) (a) of Regulation No 574/72 (Case 104/80 *Beeck* [1981] ECR 503).

III — Oral procedure

The plaintiff in the main proceedings, represented by Jünger Stahlberg, Rechtsanwalt, the Italian Government, represented by Oscar Fiumara, acting as Agent, and the Commission of the European Communities, represented by its Agent, Manfred Beschel, presented oral argument at the sitting on 5 July 1984.

The Advocate General presented his opinion at the sitting on 11 October 1984.

Decision

1 By order of 22 July 1983, received at the Court of Justice on 12 September 1983, the Sozialgericht München [Social Court, Munich] referred to the Court for a preliminary ruling under Article 177 of the EEC Treaty a question on the interpretation of Article 76 of Regulation No 1408/71 of the Council on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

2 Mr Salzano is of Italian nationality. He has been employed and resident in the Federal Republic of Germany since May 1979. His wife resides in Italy with their three children.

3 The Bundesanstalt für Arbeit [Federal Employment Office] refused to grant Mr Salzano the family allowances for his three children for the period from 1 May 1979 to 31 December 1979, on the grounds that Mrs Salzano had been working during that period and that, by virtue of being gainfully employed, she was entitled to the family allowances in accordance with Italian statutory provisions.

4 Mr Salzano brought an action before the Sozialgericht München against the decision rejecting his application. That court, by order of 22 July 1983, referred the following question to the Court of Justice for a preliminary ruling under Article 177 of the Treaty:

"Is Article 76 of Regulation No 1408/71 of the Council of 14 June 1971 to be interpreted as meaning that entitlement to family allowances must be suspended (if so, to what extent), in the country in which one of the parents is employed, also in the case where the other parent resides with the children in another Member State (country of residence) and there pursues a professional or trade activity, but does not receive any family allowances for the children because there is no application by one parent and/or waiver by the other parent as required by the domestic law so that it is not clear whether and to what extent the parent in the country of residence of the children is entitled to family allowances?"

5 Article 73 (1) of Regulation No 1408/71 provides that a wage-earner who is subject to the legislation of a Member State other than France is, as regards the members of his family residing in the territory of another Member State, entitled to receive the family benefits provided for by the legislation of the first Member State, as though they were residing in the territory of the latter.

6 Article 76 provides that entitlement to family benefits payable pursuant to Article 73 is to be suspended if, by reason of the pursuit of a professional or trade activity, family benefits or family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing.

7 The Court has already held in its judgment of 20 April 1978 (Case 134/77, *Ragazzoni*, [1978] ECR 963) that the pursuit of a professional or trade activity in the State in whose territory the members of the family are residing is not sufficient for the suspension of the entitlement conferred by Article 73 since it is necessary in addition that the family benefits should be "payable" under the legislation of that Member State. For family allowances to be regarded as "payable" under the legislation of the Member State in whose territory the members of the family are residing, the law of such State of residence must recognize the right to the payment of allowances in favour of

the person in that family who works in such State. The person concerned must thus fulfil all the conditions — both of form and of substance — which are required by the domestic legislation of that State in order to exercise that right.

8 The documents before the Court indicate that Mrs Salzano has not fulfilled the conditions required by the Italian legislation dealing with family allowances, since she did not submit the application referred to by the relevant Italian legislation.

9 Article 9 af Law No 903 of 9 December 1977 (Gazetta Ufficiale della Repubblica Italiana of 17. 12. 1977, No 343) provides as follows: "Family benefits, family allowances and pension increases for dependent members of the family may, in the alternative, be paid to the wife who is in paid employment or in receipt of a pension, on the same conditions and subject to the same limits as those which apply to a male worker who is in paid employment or in receipt of a pension. In the event of application by both parents the family benefits, family allowances and pension increases for dependent members of the family shall be paid to the parent with whom the child is living."

10 Consequently, in this instance, if Mrs Salzano had in fact been entitled to them, the family allowances would have been paid to her, provided always that a prior request had been made. In the absence of such a request Mrs Salzano was not entitled under Italian legislation to payment of the family allowances during the period in question. It follows that the family allowances were not "also payable" for the purposes of Article 76 of the aforesaid regulation.

11 The reply to be given to the question referred to the Court by the Sozialgericht München must therefore be that there is no suspension of entitlement to family allowances payable in pursuance of Article 73 of Regulation No 1408/71 in the country of employment of one of the parents when the other parent resides with the children in another Member State and pursues there a professional or trade activity but does not receive family allowances for the children, the reason being that not all the conditions laid down by the legislation of that Member State for the actual receipt of such allowances have been satisfied.

Costs

12 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 proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

in answer to the question referred to it by the Sozialgericht München by an order of 22 July 1983, hereby rules:

There is no suspension of the entitlement to family allowances payable in pursuance of Article 73 of Regulation No 1408/71 in the country of employment of one of the parents when the other parent resides with the children in another Member State and pursues there a professional or trade activity but does not receive family allowances for the children, the reason being that not all the conditions laid down by the legislation of that Member State for the actual receipt of such allowances are satisfied.

Bosco O'Keeffe Koopmans

Delivered in open court in Luxembourg on 13 November 1984.

For the Registrar

H. A. Rühl

Principal Administrator

G. Bosco

President of the First Chamber