OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 29 March 1990 *

Mr President,
Members of the Court,

1. The Bundessozialgericht (Federal Social Court) has asked the Court of Justice for a preliminary ruling on the interpretation of Articles 73(1) and 76 of Regulation (EEC) No 1408/71,[1] as amended and updated by Regulation (EEC) No 2001/83.[2] Those provisions are worded as follows:

'*Article 73*

Employed persons

1. An employed person subject to the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State.'

'*Article 76*

Rules of priority in cases of overlapping entitlement to family benefits or family allowances

* Original language: Dutch.

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

2 — Council Regulation (EEC) No 2001/83 of 2 June 1983 amending and updating Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and also amending and updating Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ L 230, 22.8.1983, p. 6, Annex I).

in pursuance of the provisions of Articles 73 and 74 by reason of the pursuit of a professional or trade activity in the country of residence of the members of the family

Entitlement to family benefits or family allowances under the provisions of Articles 73 and 74 shall 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.'

Background

2. Mr Kracht is an employed person covered by the German Bundeskindergeldgesetz (Law on Child Allowances). His wife resides in Italy with their two children, Marco and Lukas Oliver. She works for a bank in Milan.

Both children went to school in Milan. Marco pursued his studies without interruption from September 1983 until — the national court assumes — October 1987. Lukas Oliver interrupted his studies in June 1985, but resumed them in September 1986.

Until 31 December 1983, Mrs Kracht received family allowances in respect of her two children under Italian law. As from that

date she received no further benefits in respect of either child from the competent Italian institution, on the ground that she had failed to accomplish the requisite formalities. When Lukas Oliver resumed his studies in September 1986 — and, as I understand the order for reference, thereby again satisfied the substantive conditions under both German and Italian law — Mrs Kracht did not re-apply for family allowances in respect of him from the competent Italian institution, just as she did not apply for allowances in respect of Marco.

3. Mrs Kracht's attitude must be viewed in relation to the application for family allowances previously submitted by Mr Kracht in respect of their two sons to the Bundesanstalt für Arbeit and rejected by the latter. Mr Kracht brought an action against that rejection before the Sozialgericht (Social Court) Oldenburg, which annulled the Bundesanstalt's decision and ordered it (1) to pay family allowances in respect of both children until the end of 1983, after deduction of the allowances paid by the Italian institution, and (2) to pay the full amount of the family allowance in respect of Marco as from 1 January 1984 and in respect of Lukas Oliver from 1 January 1984 to 30 June 1985, and again as from September 1986. The Bundesanstalt did not appeal either against the first part of the Sozialgericht's decision or against the order to pay family allowances in respect of Lukas Oliver from 1 January 1984 to 30 June 1985. However, the Bundesanstalt did appeal, in the first instance to the Landessozialgericht (Higher Social Court) Niedersachsen and subsequently to the Bundessozialgericht, against the order to pay family allowances in respect of Marco as from 1 January 1984 and in respect of Lukas Oliver as from September 1986. The Bundessozialgericht referred the following questions to the Court for a preliminary ruling:

'(1) Is entitlement to benefits under Article 73 of Regulation (EEC) No 1408/71 to be suspended pursuant to Article 76 of that regulation if family benefits or family allowances are no longer payable in the Member State in which the members of the family reside only because they are not applied for?

(2) Is entitlement to benefits under Article 73 of Regulation (EEC) No 1408/71 to be suspended pursuant to Article 76 of that regulation if family benefits or family allowances are no longer payable in the Member State in which the members of the family reside only because they are no longer claimed as from an arbitrarily determined date?'

For the views of the national court and the observations submitted to the Court, I refer to the Report for the Hearing.

The Court's case-law

4. In its judgments in *Salzano*[3] and *Ferraioli*,[4] the Court considered the situation of a family in which the spouses were employed in different Member States and the children resided with the mother. In both of those cases, the mother had not applied for family allowances from the competent institution of her country of residence. In its judgment in *Ferraioli* — which in that respect is taken

3 — Judgment in Case 191/83 *Salzano* v *Bundesanstalt für Arbeit* [1984] ECR 3741.

4 — Judgment in Case 153/84 *Ferraioli* v *Deutsche Bundespost* [1986] ECR 1401

almost word for word from the operative part of the judgment in *Salzano* — the Court held as follows:

'There is no suspension under Article 76 of Regulation No 1408/71 of the entitlement to family allowances payable in pursuance of Article 73 of that regulation in the Member State 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 on the ground that not all the conditions laid down by the legislation of that Member State for the receipt of such allowances are satisfied.'

In paragraph 14 of the *Ferraioli* judgment, as in paragraphs 7 to 10 in the *Salzano* judgment, the Court made it clear, moreover, that the 'conditions laid down . . . for the actual receipt of such allowances' are not only those of substance but also those of form, including the condition that a prior application has been made.[5] According to the Court's case-law, therefore, the allowances are not 'payable' in the Member State in whose territory the members of the family reside, within the meaning of Article 76 of Regulation No 1408/71, where they are not actually granted because no prior application has been made.

5 — Previously, in its judgment in Case 134/77 *Ragazzoni* v *Assubel* [1978] ECR 963, the Court had stated that the suspension referred to in Article 76 of Regulation No 1408/71 can only take effect if the spouse fulfils in the Member State in which the members of the family reside '*all* the conditions required by the domestic legislation of that State in order to exercise that right' (paragraph 9, emphasis added); however, the Court did not make it clear whether that meant conditions both of substance and of form.

First question

5. In its first question the Bundessozialgericht seeks to ascertain whether the entitlement to family allowances which is provided for under the legislation of the Member State in which one of the parents is employed, in this case, German legislation, is suspended where the allowances are *no longer* payable under the legislation of the Member State in which the members of the family reside, in this case Italian legislation, on the ground that they are not (or no longer) applied for. That question is manifestly inspired by the fact that Mrs Kracht did not apply for family allowances from the competent Italian institution in respect of Lukas Oliver as from September 1986, when he resumed his studies, although she was aware that she was entitled to benefits from the Italian institution inasmuch as she had previously applied for and received such benefits.

I can see only one difference between this situation and that which came before the Court in *Salzano* and *Ferraioli*, namely the fact that in those cases an application had never been made in the Member State in which the members of the family resided, whereas in this case the allowances were initially applied for in that Member State, but subsequently ceased to be applied for. That difference is immaterial. In both situations — both where the allowances are not applied for and where they are not re-applied for — not all the conditions for the actual grant of the allowances laid down by the legislation of the Member State in which the members of the family reside are fulfilled, and consequently, according to the case-law of the Court, there are no grounds

for suspending the allowances payable under Article 73 of Regulation No 1408/71 in the Member State in which one of the parents is employed.

Second question

6. In its second question the Bundessozialgericht wishes to ascertain whether the entitlement to family allowances provided for under the legislation of the Member State in which one of the parents is employed, namely German legislation, is suspended where the allowances are no longer payable under the legislation of the Member State in which the members of the family reside, namely Italian legislation, on the ground that *as from an arbitrarily determined date* they are no longer applied for. In this question the national court manifestly wishes to draw attention to the fact that the grant of family benefits in Italy depended purely and simply on Mrs Kracht's attitude, namely her failure to accomplish the requisite formalities as from a date freely determined by her. She accomplished those formalities in connection with the family allowances for Marco in 1983, but not in 1984.

Precisely what those formalities were is unclear. The national court suggests that Mrs Kracht withdrew her initial application for the grant of family allowances. For its part, the Italian Government points out that in Italy family allowances must be re-applied for every year. Finally, the Commission states that since 1984 Italian legislation has laid down maximum income levels above which entitlement to family allowances lapses; Mrs Kracht, who presumably fulfilled the new substantive conditions for the grant of allowances (if not, it is clear that the German legislation alone would have been applicable), failed to submit the declaration of income which is required for the assessment of that condition. In my view, no importance should be attached to that difference of opinion. In the cases to which I have referred the Court does not draw any distinction according to the nature or the scope of the formalities to be accomplished.

The fact that the Italian institution discontinued payment of the benefits as a result of a conscious choice on Mrs Kracht's part not to accomplish the requisite formalities as from a date chosen by her is, in my view, equally immaterial. It follows inescapably from the Court's interpretation of Article 76 of Regulation No 1408/71 — to the effect that the allowance is payable in the Member State in which the members of the family reside when the formal conditions, including the application for the grant of the allowance, are fulfilled — that the spouses may choose the institution responsible for payment. Furthermore, that choice must be viewed in the light of the Court's established case-law, according to which the entitlement to benefit in the Member State in which one of the parents is employed is suspended only *up to* the amount provided for by the legislation of the Member State in which the members of the family reside.[6] It is therefore open to the spouses either to submit two applications, the first to the competent institution of the Member State in which the members of the family reside and the second, for payment of the balance, to the competent institution of the Member

6 — See *inter alia* the Court's answer to the second question in *Ferraioli*

State in which one of the parents is employed, or else to apply to the latter for payment of the full amount.

The amendment of Article 76 of Regulation No 1408/71

7. At the hearing, reference was made to the fact that by Regulation (EEC) No 3427/89 of 30 October 1989[7] the Council has amended Article 76 of Regulation No 1408/71, which now reads as follows:

'*Rules of priority in cases of overlapping entitlement to family benefits under the legislation of the competent State and under the legislation of the Member State of residence of the members of the family*

1. Where, during the same period, for the same family member and by reason of carrying on an occupation, family benefits are provided for by the legislation of the Member State in whose territory the members of the family are residing, entitlement to the family benefits due in accordance with the legislation of another Member State, if appropriate under Articles 73 and 74, shall be suspended up to the amount provided for in the legislation of the first Member State.

2. If an application for benefits is not made in the Member State in whose territory the members of the family are residing, the competent institution of the other Member State may apply the provisions of paragraph 1 as if benefits were granted in the first Member State.'

The new wording of Article 76(1) thus confirms the interpretation which must be given to that provision in accordance with the abovementioned cases, namely that the entitlement to benefit in the Member State in which one of the parents is employed is suspended only up to the amount paid in the Member State in which the members of the family reside and not as regards the balance in excess of that amount.

However, the new Article 76(2) alters the scope of the wording at issue in this case, as interpreted by the Court in the *Salzano* and *Ferraioli* judgments. The failure to submit a prior application in the Member State in which the members of the family reside will in the future no longer be sufficient in order to be able to claim the full amount of the allowance in the Member State in which one of the parents is employed.

At the hearing, the German Government argued that this new provision is already applicable because in fact it merely confirms the manner in which the previous version of Article 76 should have been construed. In my opinion, that view clearly runs counter to Article 3 of Regulation No 3427/89, which provides that Article 76 as amended is applicable only from 1 May 1990, even though all the other provisions of that regulation are stated to be applicable with effect

7 — Council Regulation (EEC) No 3427/89 of 30 October 1989 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ L 331, 16.11.1989, p. 1).

from 15 January 1986, that is to say that the date on which the Court gave judgment in *Pinna*,[8] to which reference is made in the preamble to the regulation. It follows that the Council in fact altered the scope of Article 76 for the future and that the earlier version, as interpreted by the Court, is applicable until the end of April 1990.

Conclusion

8. To summarize, I propose that the Court should answer the questions submitted for a preliminary ruling as follows:

'Entitlement to family allowances pursuant to Article 73 of Regulation No 1408/71, as amended and updated by Regulation No 2001/83, in the Member State in which one of the parents is employed is not suspended in accordance with Article 76 of that regulation where the other parent resides with the children in another Member State and pursues a professional or trade activity there but does not receive family allowances in respect of the children on the ground that not all the conditions laid down by the legislation of that State for the actual grant of those allowances are fulfilled, in particular on the ground that those benefits have not, or have no longer, been applied for.'

8 — Judgment in Case 41/84 *Pinna* v *Caisse d'allocations familiales de la Savoie* [1986] ECR 1.