OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 10 DECEMBER 1980 [1]

Mr President,
Members of the Court

The plaintiff in the proceedings which have led to the request for a preliminary ruling with which we now have to deal was born in Jena in 1922 and had to leave Germany in 1933 at the age of 10 as a victim of National Socialist persecution. She now has French nationality (having been deprived of German nationality), lives in France and is apparently affiliated as a worker to the social insurance scheme there, whilst she was never covered by the German social insurance scheme. She is regarded as a victim of persecution within the meaning of Article 1 of the Bundesentschädigungsgesetz [Federal Compensation Law] and as such received compensation for loss of educational opportunities.

Article 10 of the "Gesetz zur Regelung der Wiedergutmachung nationalsozialistischen Unrechts in der Sozialversicherung" [Law on the reparation of injustice perpetrated under National Socialism in the field of social insurance], hereinafter referred to as "the Reparation Law", which the 18th Rentenanpassungsgesetz [Pension Amendment Law] of 28 April 1975 inserted in the Reparation Law, provides *inter alia:*

"(1) Victims of persecution who have completed an insurance period of at least 60 calendar months and who before the commencement of the persecution paid voluntary contributions for at least 12 months, may, on application and in derogation from the provisions of Article 1418 of the Reichsversicherungsordnung [Insurance Code] and Article 140 of the Angestelltenversicherungsgesetz [Clerical Staff Insurance Law], pay contributions retroactively for periods between 1 January 1933 and 8 May 1945 or until such time as they again come within the scope of this Law, though not beyond 31 December 1955, in so far as those periods do not fall before the attainment of the age of 16 years or after the attainment of the age of 65 years and are not already covered or deemed to be covered by contributions, unless the period of persecution is already, or should be, taken into account in an insurance scheme governed by public law or in a scheme governed by the legal principles applicable to civil servants.

(2) Paragraph (1) applies correspondingly to victims of persecution who have completed an insurance period of at least 60 calendar months and who, by a decision which is final or which can no longer be challenged, have been granted compensation under Article 116 or Article 118 of the Bundesentschädigungsgesetz for loss of educational opportunities within the meaning of that Law or who began to suffer persecution within 12 months after their education ended."

1 — Translated from the German.

The plaintiff in the main proceedings wishes to take advantage of paragraph (2) of this provision. Her application to the Bundesversicherungsanstalt für Angestellte [Federal Insurance Office for Clerical Staff] for authorization to pay retroactive contributions to the pension insurance scheme for clerical staff was rejected on the ground that she had not satisfied the requirements of Article 10 a (60 months of insurance periods counting for pension purposes). Nor was she entitled to voluntary insurance under Article 10 of the Angestelltenversicherungsgesetz since she had not previously belonged compulsorily or voluntarily to a German pension insurance scheme. However, this aspect is governed by paragraph 8 (b) of Part C of Annex V to Regulation No 1408/71, which provides:

"Article 1233 of the Insurance Code and Article 10 of the Clerical Staff Insurance Law, as amended by the Pension Reform Law of 16 October 1972, which govern voluntary insurance under German pension insurance schemes, shall apply to nationals of the other Member States and to stateless persons and refugees residing in the territory of the other Member States, according to the following rules:

(a) .....

(b) if the person concerned has his domicile or residence in the territory of another Member State and at any time previously belonged compulsorily or voluntarily to a German pension insurance scheme."

The plaintiff contested that decision without success in both the Sozialgericht [Social Court] and the Landessozialgericht [Higher Social Court].

The Landessozialgericht sustained the argument of the Bundesversicherungsanstalt für Angestelle to the effect that the requirement of a period of insurance extending over 60 months could be satisfied only by contributions to the *German* pension insurance scheme. In this regard French insurance periods are not, it is said, put on a par with German periods under Article 9 (2) of Regulation No 1408/71. That provision states:

"Where, under the legislation of a Member State admission to voluntary or optional continued insurance is conditional upon completion of periods of insurance, the periods of insurance or residence completed under the legislation of another Member State shall be taken into account, to the extent required, as if they were completed under the legislation of the first State."

It was said that the purpose of Article 10 a of the Reparation Law was to provide compensation for insured persons who had undergone persecution and as a result of that persecution had suffered prejudice in the field of social insurance. Since the sole aim of Regulation No 1408/71 was to protect the free movement of workers in relation to social security law, it must be assumed that the said Article 10 a did not fall within the scope of Regulation No 1408/71.

Thereupon the plaintiff appealed on a point of law to the Bundessozialgericht [Federal Social Court]. She argued that Community law had been wrongly applied when her case was decided. Matters had to be approached on the basis that the proviso in paragraph 8 (b) of Part C of Annex V to Regulation No 1408/71 did not extend to Article 9 (2) of that regulation; it referred only to the entitlement to pay voluntary contributions under Article 10 of the Clerical Staff Insurance Law, and had nothing to do with the recognition of insurance

periods in other Member States as qualifying insurance periods under Article 10 a of the Reparation Law. In any case, it had to be assumed that the said proviso did not override the principle of equality of treatment, which found expression in Article 3 (1) of Regulation No 1408/71 in the following terms:

"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 the State."

Therefore, it was argued, in Community law it was necessary to proceed on the basis that all persons who belong to the insurance scheme of one Member State also belong to the German insurance scheme. The plaintiff sought further support for her contention in the social security convention between the Federal Republic of Germany and the United States, from which it is clear that the 60-month insurance period mentioned in Article 10 a of the Reparation Law may also be covered by American insurance periods.

The Federal Insurance Office for Clerical Staff conceded in the appeal on a point of law that the provisions of the Reparation Law as a whole fell within the scope of Regulation No 1408/71. Article 9 (2) thereof could accordingly be applied in so far as contribution periods in other Member States might be taken into account for the purpose of the qualifying insurance period of 60 months. But, it was argued, in every case the legal definition of the term "victims of persecution" in Article 1 of the Reparation Law was crucial. According to that provision, the Law applied only to "insured persons" and it was therefore a requirement that at least *one* contribution should have been paid to a German pension insurance institution. In *this* respect not even Article 9 (2) of Regulation No 1408/71 could have the result that the said requirement might also be fulfilled by a French insurance period.

By order of 19 December 1979 the Bundessozialgericht stayed proceedings and referred the following questions to the Court of Justice for a preliminary ruling pursuant to Article 177 of the EEC Treaty:

"1. Must Article 4 (1) of Regulation (EEC) No 1408/71, whereby that regulation applies to legislation concerning 'branches of social security', be construed as meaning that entitlement to pay contributions retroactively under the Law on the reparation of injustice perpetrated under National Socialism in the field of social insurance (Reparation Law) of 22 December 1970, in the version of 27 June 1977 (Bundesgesetzblatt 1970 I, p. 1846 and Bundesgesetzblatt I 1977, p. 1040) comes within the scope of that regulation, in so far as the victims of persecution must be regarded as workers within the meaning of Article 1 (a) of Regulation (EEC) No 1408/71?

If the answer is in the affirmative, does that special right to pay contributions retroactively form part of a benefit scheme within the meaning of Article 4 (4) of Regulation (EEC) No 1408/71, thus excluding the applicability of the regulation?

2. If Regulation (EEC) No 1408/71 is applicable, does Article 9 (2) thereof apply to the insurance period of 60

months required under Article 10 a of the Reparation Law in so far as a person's status as an insured person (and thus as a victim of persecution) under Article 1 (1) of the Reparation Law is thereby created?"

My opinion on these questions is as follows:

1. First question

Examination of this question must be prefaced by the observation that the Federal Compensation Law created a general system for the compensation of victims of National Socialist persecution, but that, as a result of Article 138 thereof, reparation for prejudice suffered in the field of social insurance was excluded from that Law and left to special provisions. Accordingly, the provisions of the Reparation Law govern the question of compensation for victims of National Socialist persecution in so far as disadvantages in the field of statutory accident and pension insurance are concerned. As the court making the reference has expressly pointed out, that Law does not establish a special self-contained system of compensation; rather, its provisions supplement or amend the general provisions on social insurance (Insurance Code, Clerical Staff Insurance Law and the Miners' Insurance Law) and are therefore a constituent part of the general system of German social insurance law.

In this regard it is clear from the case-law that the fact that a provision belongs to the body of legislation on social security does not in itself determine whether a benefit granted by such a provision should be regarded as a social security benefit within the meaning of Regulation No 1408/71 (see the judgment of 31 May 1979 in Case 207/78 (*Ministère Public* v *Gilbert Even and Office National des Pensions pour Travailleurs Salariés* [1979] ECR 2019 at p. 2032). On the other hand, as the plaintiff in the main proceedings rightly submitted, the first question to be decided is not settled by the fact that the Reparation Law is not contained in the declaration made by the Federal Republic of Germany pursuant to Article 5 of Regulation No 1408/71, because such declarations are clearly not exhaustive in nature.

The question whether the rules at issue in this case fall within the scope of Regulation No 1408/71 must therefore be decided on the basis of essential characteristics of the benefits in dispute, the conditions for the granting thereof and the purpose of the rules. On this point reference may be made to the judgment of 6 July 1978 in Case 9/78 *Directeur Régional de la Sécurité Sociale de Nancy* v *Paulin Gillard and Caisse Régionale d'Assurance Maladie du Nord-Est, Nancy*, [1978] ECR 1661. Also of importance, as is clear from the judgment of 31 March 1977 in Case 79/76 *Carlo Fossi* v *Bundesknappschaft* [1977] ECR 667, is the fact that 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.

The Reparation Law pursues the aim of providing redress in cases where, as a result of National Socialist persecution, prejudice has been suffered in the field of statutory accident and pensions insurance by seeking to make possible continued insurance and the retroactive payment of contributions. This is particularly important in the case of pension insurance. With regard to the entitlement to pay contributions retroactively under the provisions of Article 10 a, which I

quoted at the outset, it is quite clear that where certain conditions are satisfied a legal status, or a right, is conferred, and that therefore there can be no question of discretionary authorizations depending on need and on the circumstances of the particular case. Further these compensatory benefits for an integral part of the general system of benefits provided under social insurance law. They require as a precondition that the claimant should be an *insured person* and that he should have completed a certain minimum insurance period and in the case of subsequent insurance for periods in respect of which the acquisition of pension rights was not possible as a result of persecution, they consist in the creation of such cover retroactively by means of regular insurance contributions. Besides, as the Commission has rightly pointed out, it may also be significant that, quite apart from the Reparation Law, the law of compensation and the law of social security are closely interrelated. Thus the general insurance legislation (Insurance Code, Clerical Staff Insurance Law and Miners' Insurance Law) contains provisions whereby certain periods of persecution are treated as duly completed insurance periods. On the other hand, Article 1 (2) of the Reparation Law provides that "the periods deemed to have been validly completed under subparagraph (4) of Article 1251 (1) of the Insurance Code, subparagraph (4) of Article 28 (1) of the Clerical Staff Insurance Law and subparagraph (4) of Article 51 (1) of the Miners' Insurance Law" are to be taken into account as periods of persecution, that is to say without payment of contributions.

Accordingly, there is in fact justification for the view that, because it is particularly closely related to the system of statutory pensions insurance by virtue of the conditions attached to it, its purpose and legal consequences, the entitlement to pay contributions retroactively under Article 10 a of the Reparation Law should be regarded as a branch of social insurance and therefore come within the scope of Regulation No 1408/71.

To that one might add that the aforesaid entitlement to pay contributions retroactively is certainly not covered by Article 4 (4) of Regulation No 1408/71, which provides:

"This regulation shall not apply to social and medical assistance, to benefit schemes for victims of war or its consequences, or to special schemes for civil servants and persons treated as such."

In fact it is common ground that the entitlement to pay contributions retroactively does not belong to any of the special schemes expressly mentioned. Further comment in that respect is not required.

2. Second question

This question concerns the construction of Article 9 (2) of Regulation No 1408/71 which is quoted above. It seeks to clarify whether that provision also applies to the insurance period of 60 months required under Article 10 a of the Reparation Law in so far as a person's status as an *insured person* under Article 1 (1) of that Law is thereby created.

In the view of the Federal Insurance Office for Clerical Staff and the Commission that question should be answered in the negative.

According to the plaintiff in the main proceedings, the wording and purpose of the provision require full recognition of insurance periods completed in other Member States without attaching further conditions.

A narrow construction of that provision to the effect that it does not apply to contribution periods which establish the status of insured persons would not only conflict with the principle that prejudice in the field of social insurance should not arise as a result of the choice of

residence within the Community; it would also be contrary to the principles of Article 3 of Regulation No 1408/71, whereby persons who belong to the social insurance scheme of one Member State are at the same time insured persons in the other Member States.

In my view the plaintiff's submission on this point cannot be upheld.

Admittedly, support for this view cannot be sought by direct recourse to Article 9 (1) of Regulation No 1408/71 and the aforesaid paragraph 8 (b) of Part C of Annex V, from which it is clear that membership of the German pension insurance scheme must previously have been acquired. There is in fact no doubt whatever that those provisions cannot be applied to the entitlement to pay contributions retroactively under the Reparation Law, because Article 9 (1) refers to provisions imposing a requirement of *residence* in the Member State in question and that is not so in the case of the Reparation Law, which contains no such requirement of residence. As for Annex V, it is clear that it deals only with Article 1233 of the Insurance Code (Reichsversicherungsordnung) and Article 10 of the Clerical Staff Insurance Law (Angestelltenversicherungsgesetz) whereas this case involves Article 10 a of the Reparation Law, which belongs to a different scheme and is entirely independent of the Clerical Staff Insurance Law.

However, the correct view is clearly that *by implication* a principle similar to that which is expressly stated in Article 9 (1) underlies Article 9 (2). The latter provision is merely a provision on the *aggregation* of insurance periods, that is to say, its effect is to assimilate foreign insurance periods in so far as benefits depend on the duration of the period of insurance, with the result that recourse may be had to it in order to decide, for example, whether there was a minimum period of insurance of 60 months *in toto*. But the purpose of the provision is not to *create* the status of insured person; rather, it presupposes such a status. This is, as the Commission has shown, a principle which prevails throughout Regulation No 1408/71. In fact none of the provisions which the Council has adopted under Article 51 of the EEC Treaty with regard to the requirement that insurance periods be aggregated (Articles 18, 38, 45, 64, 67 and 72 of Regulation No 1408/71) deals with the *creation* of the status of insured person. As the Federal Insurance Office for Clerical Staff rightly points out, that question is in principle unaffected by the Community law on social security. Rather, the creation of the status of insured person is a matter for national law and an essential condition precedent for the application of Regulation No 1408/71.

In this regard reference may be made to two judgments which were cited in the course of the proceedings. In the judgment of 12 July 1979 in Case 266/78 *Bruno Brunori* v *Landesversicherungsanstalt Rheinprovinz* [1979] ECR 2705 it was stressed that, although Article 45 of Regulation No 1408/71 contemplates aggregation of insurance periods, that aggregation does not as such deal with "questions relating to affiliation and cessation of affiliation to the various social security schemes, which are matters for the national legal systems alone". Similarly in the judgment of 24 April 1980 in Case 110/79 *Una Coonan* v *Insurance Officer* [1980] ECR 1445 it was held that although Articles 18 and 46 of Regulation No 1408/71 govern the aggregation of qualifying periods, "they do not govern the preliminary question of ascertaining the conditions under which a national of a Member State may or must be affiliated to the social security scheme of another

Member State". In that judgment the Court went on to say that it is for each Member State to lay down the conditions creating the right or the obligation to become affiliated to the social security scheme or to a particular branch of such a scheme and that if national legislation makes affiliation to a social security scheme or to a particular branch of that scheme conditional on prior affiliation by the person concerned to the national social security scheme, Regulation No 1408/71 does not compel Member States to treat as equivalent insurance periods completed in another Member State and those which were completed previously on national territory.

In answer to that the plaintiff's reference to the requirement of equality of treatment under Article 3 of Regulation No 1408/71 and to the fact that she did not abandon her residence in Germany voluntarily and was deprived of German nationality is irrelevant. With regard to the first point the Commission rightly submitted that it is not the purpose of the aforesaid requirement of equality of treatment to pursue a general assimilation of all the elements of insurance since that would go far beyond the coordinating function of Regulation No 1408/71. With regard to the other two circumstances pleaded, they cannot lead to a special interpretation of Regulation No 1408/71 because it is a question of typical aspects of the law of compensation which cannot as such require consideration in the light of Regulation No 1408/71.

3. Accordingly, the questions submitted by the Bundessozialgericht should be answered as follows:

(a) For the application of Article 4 (1) of Regulation No 1408/71, that is to say, for the purpose of answering the question whether a statutory provision belongs to the field of social security, regard must be had to the essential characteristics of the benefits provided, their purpose and the conditions for the grant thereof. According to those criteria entitlement to pay contributions retroactively under the Law on the reparation of injustice perpetrated under National Socialism in the field of social insurance (Reparation Law) comes within the scope of Regulation No 1408/71, in so far as victims of persecution are treated as workers within the meaning of Article 1 of the regulation. However, the aforesaid right to pay contributions retroactively does not form part of a benefit scheme within the meaning of Article 4 (4) of Regulation No 1408/71, such as would exclude the applicability of the regulation.

(b) Article 9 (2) of Regulation No 1408/71 applies to the insurance period of 60 months required under Article 10 a (2) of the Reparation Law only in so far as a person's status as an insured person under Article 1 (1) of the Reparation Law is not thereby created.