OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 23 January 1986 *

Mr President,
Members of the Court,

1. The present request for a preliminary ruling concerns the interpretation of Article 76 of Regulation No 1408/71 (Official Journal, English Special Edition 1971 (II), p. 416) which reads:

'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.'

As in *Salzano*, the case in which judgment was given on 13 November 1984, the request seeks clarification of the terms on which that Community clause against overlapping applies and more particularly seeks to determine whether, and to what extent, family allowances must be paid by a Member State of employment of a worker from another Member State in respect of children living in the Member State of origin where his wife is employed.

2. Antonio Ferraioli is an Italian national who has been employed by the Deutsche Bundespost since 1961. Under the provisions of the Bundeskindergeldgesetz [Federal Law on Child Allowances], as supplemented by Article 73 of Regulation No 1408/71, the Deutsche Bundespost paid him family allowances in respect of his three children living in Italy with their mother.

On learning that his wife had been working there since 1971 the administration stopped payment of the allowances with effect from 1 May 1979. Subsequently the Deutsche Bundespost partly reversed its decision: in view of the fact that entitlement to the Italian allowances stopped when the child reached 16, it resumed payment of the German allowances for Mr Ferraioli's two children who had reached that age. Nevertheless, as regards one of them, aged 15 at the relevant time, the payment of the allowance was interrupted from 1 May to 30 September 1979 and as regards the youngest, aged 10, it remains suspended.

After his complaint to the administration was rejected Antonio Ferraioli brought proceedings in the Sozialgericht [Local Social Court] in Munich to obtain payment of the family allowances suspended or stopped since 1 May for the two younger children but confined his claim to the difference between the German and Italian allowances.

After the Deutsche Bundespost had appealed unsuccessfully to the Bayerische Landessozialgericht [Regional Social Court] from the judgment of the court of first instance upholding the plaintiff's claim in full, the case case before the Bundessozialgericht [Federal Social Court] which referred the following three questions to this Court:

* Translated from the French.

'(1) Does Article 76 of Regulation (EEC) No 1408/71 cover cases in which the family benefits or allowances arising from employment are not paid in the Member State in which the members of the family reside, according to the law of that State, only because the parent who is entitled has not applied for them?

(2) Are the family benefits payable to a parent in the State of employment under Article 73 of Regulation (EEC) No 1408/71 to be wholly suspended under Article 76 of that regulation or only to the extent to which family benefits on account of the professional or trade activity of the other parent are payable in the State of residence of the other members of the family?

(3) Is full suspension required under Article 76 of Regulation (EEC) No 1408/71 even where national law (in this case the Bundeskindergeldgesetz [Federal Law on Child Allowances)] provides that in the event of overlapping with foreign benefits of the same kind the parent remains entitled to the difference?'

3. The first question does not call for much discussion since the problem it raises was settled by the Court in *Salzano.*

In answer to a question regarding the terms on which family allowances payable by the Member State of residence were to be regarded as 'payable' within the meaning of Article 76 of Regulation No 1408/71 so as to justify suspension of the allowances of the same kind in the Member State of employment the Court, following my opinion, held as follows:

'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' (paragraph 11, my italics).

As is clear from the grounds of the judgment, the relevant terms are such as are imposed by the legislation of the Member State of residence and relate either to substance or form (Case 191/83 *Salzano* v *Bundesanstalt für Arbeit* [1984] ECR 3741, paragraphs 7 to 10). In other words, if no application has been made by Mrs Ferraioli, which is the case put by the Bundessozialgericht in its first question, the conditions for applying the clause against overlapping in Article 76 are not satisfied.

It is true that that interpretation necessarily gives the spouses an option as to which legislation is to be the applicable legislation for the grant of allowances. As I have already pointed out in my opinion in *Salzano*, that is not unreasonable. I might add to what I then said that it is quite clear from the case-law that Article 76 is far from being a provision which places the burden of family allowances solely on the Member State of residence, for its sole object, as I shall remind the Court later, is to avoid any unjust enrichment which might otherwise

arise as a result of the geographical dispersal of the family of the migrant worker. Let me nevertheless point out that it would be at least paradoxical if this Community provision were to deprive spouses of the equal treatment given to them by the domestic law of the Member States in question solely because one of them returns with the children to work in the country of origin.

4. The second question raised by the Bundessozialgericht was not contemplated in *Salzano* since the national court asked the question only in the alternative.

Nevertheless, as I said also as an alternative argument in my Opinion in that case, according to established case-law allowances due to a worker in the State of employment do not entirely disappear when allowances of the same kind are actually paid in the Member State of residence.

The Court has taken the view that

'The guiding principles' of Regulation No 1408/71 'require that, if the amount of the benefits provided by the State of residence is less than that of the benefits awarded by the other State responsible for paying them the worker or his dependent shall continue to be entitled to the greater amount and shall receive from the competent institution of that latter State a supplement to the benefit equal to the difference between the two amounts.' (Case 320/82 *D'Amario* v *Landesversicherungsanstalt Schwaben* [1983] ECR 3811, paragraph 7 at p. 3821).

Accordingly, the Court found it necessary to say in the judgment in *Patteri* that the interpretation of the regulation was subject to the principle of free movement of workers which is a fundamental aim of Article 51 of the EEC Treaty (Case 242/83 *Caisse de compensation pour allocations familiales* v *Patteri* [1984] ECR 3171, paragraphs 8 and 9 at pp. 3190 and 3191).

5. The answer thus given to the second question put by the Bundessozialgericht makes it unnecessary to consider the last question. That rests, as is clearly apparent from the grounds of the national order, on the hypothesis which I have just dismissed, namely the complete suspension of the family allowances payable in the Member State of employment.

6. In view of the foregoing considerations I propose the following answers to the questions put by the Bundessozialgericht:

(a) Article 76 of Regulation (EEC) No 1408/71 must be interpreted as meaning that entitlement to family allowances under Article 73 in the country of employment of one of the parents is not suspended if the other parent lives with the children in another Member State and works there but does not receive family allowances for the children because not all the conditions upon which family allowances are payable under the legislation of that Member State are satisfied.

(b) Entitlement to family allowances in the Member State of employment under Article 73 of Regulation No 1408/71 is suspended under Article 76 only to the extent that family allowances of the same kind are actually payable in the Member State in the territory of which the members of the family reside.