REPORT FOR THE HEARING
in Case C-117/89 *

I — Facts

1. Article 73(1) of Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416), as amended by Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6), provides as follows:

'*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 of that regulation provides as follows:

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

2. The plaintiff and respondent in the main proceedings, Mr Kracht, is an employed person covered by the Bundeskindergeldgesetz (Federal Law on Child Allowances). His wife, an Italian national, resides in Italy with their children Marco, born on 3 May 1964, and Lukas Oliver, born on 11 March 1966. She works for a bank in Milan.

Mrs Kracht received family allowances under Italian law in respect of her two children only until 31 December 1983, because from that date onwards she did not apply for payment of those allowances. Neither did Mrs Kracht apply for family allowances from the competent Italian institution when Lukas Oliver resumed his studies in September 1986.

The Bundesanstalt für Arbeit (Federal Employment Office), the defendant and appellant in the main proceedings, refused to pay family allowances to Mr Kracht. By judgment of 12 June 1987 the Sozialgericht (Social Court) Oldenburg annulled the defendant's decisions. In its judgment of 22 September 1987 the Landessozialgericht (Higher Social Court) Niedersachsen dismissed the defendant's appeal against the order to pay family allowances in respect of Marco as from 1 January 1984 and in

* Language of the case: German.

respect of Lukas Oliver as from 1 September 1986.

By order of 22 February 1989, the Tenth Chamber of the Bundessozialgericht (Federal Social Court), hearing an appeal on a point of law, stayed the proceedings and requested the Court to give a preliminary ruling on the following questions:

'(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?'

3. The national court emphasizes that Article 76 of Regulation No 1408/71 does not state whether the suspension of entitlement to family benefits which it provides for in the country of employment also applies where an application for family allowances has never been submitted in the country in which the family resides or where the application is withdrawn as from an arbitrarily selected date.

The national court is unable to concur in the interpretation given by the Court of Justice in its judgment in Case 191/83 *Salzano* v *Bundesanstalt für Arbeit* [1984] ECR 3741, according to which there is no suspension of entitlement where an application for allowances has not been submitted. That interpretation would mean that the rule of priority established by that article could be rendered ineffective by a mere declaration on the part of the person entitled; that would be contrary to its mandatory nature as a rule of priority whose aim is to determine which institution is under a duty to pay the benefit and which must be applied independently of the will of the person entitled.

Furthermore, that interpretation creates openings for abuse which were not intended by the Community legislature inasmuch as it enables the institution of the country of residence to advise persons entitled to benefit to refrain from submitting an application in that country in order to secure payment of the benefit in full in the country of employment.

The national court therefore considers that the matter must be reconsidered.

II — Procedure before the Court

4. The order for reference was received at the Court Registry on 10 April 1989. In accordance with Article 20 of the Protocol on the Statute of the Court of Justice of the European Communities, written observations were submitted:

(i) on 7 July 1989 by the Commission of the European Communities, repre-

sented by Dimitrios Gouloussis and Jörn Pipkorn, members of its Legal Department;

(ii) on 3 August 1989 by the Government of the Italian Republic, represented by Pier Giorgi Ferri, avvocato dello Stato.

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, and, in accordance with Article 95(1) of the Rules of Procedure, assigned the case to the First Chamber.

III — Written observations submitted to the Court

A — *First question*

5. The *Commission* states that the question whether the suspension of entitlement to family allowances in the country of employment under Article 76 of Regulation No 1408/71 requires fulfilment only of the substantive conditions or of all the conditions, whether substantive or procedural, conferring entitlement to family allowances in the State in which the family resides is a matter which has already been decided by the Court.

In its judgments in Case 134/77 *Ragazzoni* v *Assubel* [1978] ECR 963, in Case 191/83 *Salzano* v *Bundesanstalt für Arbeit* [1984] ECR 3741 and in Case 153/84 *Ferraioli* v *Deutsche Bundespost* [1986] ECR 1401, the Court held that the suspension of entitlement to family allowances provided for in Article 76 of Regulation No 1408/71 does not take effect unless all the procedural and substantive conditions laid down by the legislation of the country of residence are fulfilled.

Mrs Kracht is in the same position as Mrs Salzano in Case 191/83 and Mrs Ferraioli in Case 153/84. She failed to submit the requisite application to the competent Italian institution. Accordingly, the same principle must be applied: a suspension — even in part — of entitlement to German family allowances is not permissible.

The objection raised by the Bundessozialgericht against those judgments disregards the fact that the basis of the system underlying Articles 73 and 76 of Regulation No 1408/71 lies, in accordance with Article 51 of the EEC Treaty, in the maintenance of entitlement to benefits for workers and those entitled under them, which may not be reduced on the ground that the members of the worker's family reside in another Member State.

Under that system, the aim of Article 76 is to prevent unjust enrichment as a result of overlapping entitlement to family benefits in the country of employment and in the country of residence. That provision must not be understood as a conflicts rule which determines the legislation applicable to benefits.

Any other interpretation would expose migrant workers to the risk that their entitlement to family benefits might be suspended in the country of employment while at the same time any benefits payable in the country of residence might not in fact be paid.

The Commission acknowledges that this interpretation enables spouses to exert an influence through their choice on the apportionment of the financial burden between Member States. That is why it is currently seeking a balanced solution to the problem by means of a revision of Article 76 of Regulation No 1408/71 designed to preserve the rights and interests of migrant workers.

6. The *Government of the Italian Republic* points out that the Court has on several occasions ruled on the interpretation of Article 76 of Regulation No 1408/71 (judgments in Cases 134/77, 191/83 and 153/84, cited above, and judgments in Case 100/78 *Rossi* v *Caisse de compensation pour allocations familiales* [1979] ECR 831 and in Case 149/82 *Robards* v *Insurance Officer* [1983] ECR 171).

Furthermore, the Italian Government does not share the concerns expressed by the national court to the effect that the interpretation of Article 76 of Regulation No 1408/71 adopted by the Court in its case-law would leave the determination of the applicable legislation to the unfettered choice of the persons entitled to benefits.

That provision is to be regarded not as a conflicts rule but as a provision which is designed to prevent the unjustified overlapping of benefits having the same function for social security purposes.

B — *Second question*

7. As regards the second question, which relates to the applicability of Article 76 of Regulation No 1408/71 where suspension of entitlement to benefits in the country of residence is attributable to the fact that such entitlement is no longer claimed as from an arbitrarily selected date, the *Commission* points out that once again the procedural conditions conferring entitlement to the allowances payable under Italian law are not fulfilled.

Whereas in the first case no application has been made, in the second case it is the supporting documents relating to income which have not been produced. Accordingly, entitlement must not be suspended under Article 76 of Regulation No 1408/71 in this case either.

8. According to the *Italian Government*, in its second question the national court believes it is introducing a new factor, namely that the spouse residing in Italy initially applied for family allowances from the competent Italian institution but subsequently withdrew the application.

The Italian Government points out, by way of rectification, that it is not a withdrawal of the initial application that is involved, but the failure to submit an application which must be renewed every year.

In any event, since it has been acknowledged that Article 76 is inapplicable even if entitlement to the allowances payable under the legislation of the country of residence does not arise as a result of a voluntary choice made by the spouse employed there, the same principle applies in the event of the initial choice being changed.

Finally, the Italian Government emphasizes that the optional nature of the grant of family allowances for either spouse constitutes an application of the principle of equality for men and women, which is also a feature of Community law.

IV — Oral procedure

9. The *Government of the Federal Republic of Germany*, which did not submit any written observations to the Court, expressed its views at the hearing.

After observing that the Court has already held, *inter alia* in its judgment in *Ferraioli*, that the suspension of entitlement to benefits provided for in Article 76 of Regulation No 1408/71, in the version in force until 30 April 1990, is inoperative where the conditions of entitlement in the State in which the members of the family reside, whether substantive or procedural, are not fulfilled, the German Government states that the question now is whether that ruling applies in all circumstances.

In that regard, it emphasizes in the first place that Article 76 of Regulation No 1408/71 is a provision which determines the applicable legislation; in other words, as expressly stated in the title of that article, it is a rule of priority.

It goes on to observe that since the rule of priority in Article 76 is set out in a regulation, it has the force of law. Its application cannot, therefore, be left to the applicant's discretion.

Arguing against the possibility of such a choice, the German Government relies on the fact that Article 76 is based on the principle that it is the State in which the members of the family reside that must be primarily responsible for discharging the duty of assistance towards its citizens. Furthermore, it is that State which is best placed to assess the needs of the migrant worker's family in relation to the situation prevailing within the State.

The German Government considers that the possibility of such a choice would also result in the beneficiary choosing the State with the highest allowances, thereby altering in an unacceptable manner the apportionment of the financial burden envisaged by Article 76 of Regulation No 1408/71.

According to the German Government, that possibility could also give rise to practical difficulties inasmuch as the person entitled might be able to obtain both the benefits paid by the country in which the family resides and those paid by the country of employment; that can be prevented only by the application of a rule of priority.

Finally, the German Government considers that its interpretation of the provision in no way places the person entitled at a disadvantage, since that person will receive the highest family allowance in any event. According to the Court's judgments in Case 153/84 *Ferraioli*, cited above, and in Case 733/79 *CCAF* v *Laterza* [1980] ECR 1915, Article 76 of Regulation No 1408/71 must be interpreted as meaning that the Member State which is under a secondary obligation to grant benefits must pay the difference between the two amounts where the benefits which it pays are higher than those provided for in the State in which the migrant worker's family resides.

The German Government comes to the conclusion that the rule of priority laid

down in Article 76 of Regulation No 1408/71 is absolutely binding. The new version of Article 76 of Regulation No 1408/71, embodied in 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 No 1408/71 (Official Journal 1989 L 331, p. 1), is intended not to make a substantive change in the law but quite simply to clarify a legal situation which has given rise to the most varied interpretations.

G. C. Rodríguez Iglesias

Judge-Rapporteur