OPINION OF MRS ADVOCATE GENERAL ROZÈS DELIVERED ON 27 OCTOBER 1983 [1]

Mr President,
Members of the Court,

Pursuant to Article 177 of the EEC Treaty the Bundessozialgericht [Federal Social Court] has referred the following question to the Court of Justice:

"Must the German pension institution pay to an orphan who is an Italian national and who has always lived in Italy a supplement to the orphan's pension granted to him by the Italian pension institution if, although his late father paid contributions to both the German and the Italian pension institutions, entitlement to the grant of an orphan's pension was acquired under German legislation by virtue of the German contributions alone?"

I — The facts are as follows:

Benito D'Amario, who was born on 8 October 1963, is the son of a migrant worker of Italian nationality.

His father worked in turn in Germany and in Italy.

In Germany he completed an insurance period of 83 months (April 1964 to January 1969).

He returned to Italy in 1970 where he continued to pursue employment until December 1974, that is to say, during an insurance period of 111 months.

He was declared unfit for work and, in accordance with the provisions of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 [2] which were applicable to him, he obtained as from 1 March 1974, from the Landesversicherungsanstalt Schwaben, the payment of a pension under German legislation. He also obtained as from the same date, from the Istituto Nazionale per la Previdenza Sociale [National Social Welfare Institution], the payment of a pension together with family allowances for his dependent son.

He died on 11 January 1980. Following his death, the German social security institution granted his widow a proportional pension. On the other hand, it refused to pay in addition even a proportional orphan's benefit to Benito D'Amario under the German legislation. It based its decision on Article 78 (2) of Regulation No 1408/71 which provides that:

"Orphans' benefits shall be granted ..., irrespective of the Member State in whose territory the orphan or the natural or legal person actually maintaining him is resident:

...

(b) for the orphan of a deceased worker who was subject to the legislation of several Member States:

(i) in accordance with the legislation of the Member State in whose territory the orphan resides provided that ... a right to one of the benefits referred to in paragraph (1) is acquired under the legislation of that State; ...

1 — Translated from the French.

2 — 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).

(ii) in other cases in accordance with the legislation of the Member State to which the deceased worker had been subject for the longest period of time, provided that ... the right to one of the benefits referred to in paragraph (1) is acquired under the legislation of that State ...

However, the legislation of the Member State applicable in respect of provision of the benefits referred to in Article 77 for a pensioner's children shall remain applicable after the death of the said pensioner in respect of the provision of the benefits to his orphans."

It was therefore sought to justify that refusal on the grounds that the Italian institution itself paid an orphan's benefit to Benito D'Amario, that he had never left Italy and that the insurance periods completed by his father in that State were longer than the periods completed in the Federal Republic of Germany.

Benito D'Amario brought an action for the annulment of that decision before the Sozialgericht [Social Court] Augsburg which allowed the application and ordered the German institution to pay the orphan under German legislation a pension equal to the amount by which such a pension exceeded the benefit received under the Italian legislation.

The case was brought before the Bundessozialgericht by the German social security institution and that court submits the question to which I have just referred.

II — The view of the German insurance institution rests on the *letter* of the Community regulations.

Where the worker has been subject to the legislation of two or more Member States, orphans' benefits are granted in accordance with the legislation of the State of *residence* provided that such a right is acquired under that legislation. [1] If a worker who has been subject to the legislation of two (or more) Member States received, when alive, in addition to an invalidity pension, additional payments in respect of dependent children or family allowances from the social security institution of the State of residence of that child, that institution remains under the obligation, on the parent's death, to pay orphans' benefits in accordance with the legislation of that State provided that a right to such payment is acquired under that legislation. [2]

Those detailed rules also seem to correspond to the *aim* pursued by the Community provisions:

In order to resolve the difficulties resulting from the differences in national laws (some provide for the payment of family allowances to the children of pensioners, some grant supplements to pensions or orphans' pensions, whilst, finally, others provide for the overlapping of the different benefits), Article 77 of Regulation No 1408/71 [3] lays down the principle that all the benefits granted under other branches of social security to the children of workers who are in receipt of a pension or who are deceased are to be assimilated to family allowances.

Benefits for children are granted under the legislation and paid by the competent institution of a *single* Member State, as if the worker had completed his entire working life under the legislation of that State. The legislation applicable is

1 — Article 78 (2) (b) (i).

2 — Article 78 (2) (b) (ii).

3 — As amended by Regulation (EEC) No 2864/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (31 December), p. 15).

determined according to criteria identical to those which are adopted for the allocation of sickness and maternity insurance benefits to pensioners.

In addition, Article 79 (3) provides that the right to benefits due under Articles 77 and 78 is to be suspended if the children become entitled to family benefits or family allowances under the legislation of another Member State by virtue of the pursuit of a professional or trade activity.

The regulation therefore is intended to achieve a double object:

The legislation under which the orphan is paid must be determined definitively and, once the rights which are provided for by that legislation have been exhausted, it is not possible to resort to other legislation which might allow for the payment of additional benefits.

It is also necessary to avoid the payment of reduced benefits or, on the other hand, an overlapping (partial or total) of benefits determined in relation to the orphan's country of residence where the deceased worker had been subject, in the course of his working life, to different laws, some of which provided for the payment of pensions and others for the allocation of family allowances to orphans.

III — 1. Nevertheless, the implementation of that object and the application of those detailed rules are subject to the overriding general principle which, as the Court has frequently held, may be extracted from Article 51 of the Treaty and the regulations adopted in application of that provision and as a result of which:

"the Community rules could not, in the absence of an express exception *consistent* with the aims of the Treaty, be applied in such a way as to deprive a migrant worker or his dependents of the benefit of a part of the legislation of a Member State." [1]

The Court's judgment of 12 June 1980 in *Laterza*, [2] which was concerned with *family allowances* [3] repeated that passage and stated in addition that such rules could not be applied in such a way as to "lead to a reduction in the benefits payable by virtue of that legislation supplemented by Community law".

The Court held that

"In laying down and developing the rules for coordinating national laws Regulation No 1408/71 is in fact guided by the fundamental principle stated in the seventh and eighth recitals of the preamble to the regulation, that the aforesaid rules must guarantee to workers who move within the Community all the benefits which have accrued to them in the various Member States whilst *limiting them 'to the greatest amount'* of such benefits."

More recently the Court stated that,

"Under well-established case-law based on the fundamental principle of freedom of movement for workers and the objective of Article 51 of the EEC Treaty, a rule designed to prevent the overlapping of family allowances is applicable only to the extent to which it does not, *without cause*, deprive those concerned of an entitlement to benefits

1 — Judgment of 6 March 1979, Case 110/78 *Rossi* [1979] ECR 831, at paragraph 14 of the decision.

2 — Case 733/79 [1980] ECR 1915, at p. 1925, paragraph 8.

3 — Article 77 (2) (b) (i).

conferred on them by the legislation of *a* Member State." [1]

The judgment in *Gravina* [2] extended that interpretation to *benefits for orphans* and stated that:

"The aim of Article 51 would not be achieved if, as a result of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed to them, in any event, by the legislation of a single Member State."

That case was concerned with the refusal to *continue* the payment of a pension to orphans who had transferred their residence to a Member State in which they were entitled to receive other benefits on the same grounds.

2. The facts of the case before the Court are different inasmuch as the orphan has always resided in Italy and no award has yet been made in respect of the entitlement to higher benefits which, as has not been contested, is acquired under German legislation alone. [3]

Those special features need not, in my view, affect the scope of the interpretation given in the judgment in *Gravina*, the operative part of which, moveover, makes no reference whatsoever to a change of residence or to the actual payment of a higher benefit.

As regards the *change of residence*, in *Laterza* the Court rejected the objection based on the fact that the children, for whose benefit the allowances were claimed on the basis of Belgian legislation alone, had never lived in Belgium.

It follows from the judgment in *Beeck* that

"The objective of Regulation No 1408/71 . . . is to guarantee all workers who are nationals of the Member States and who move within the Community equality of treatment in regard to the different national laws and the enjoyment of social security benefits irrespective of the place of their employment or of their residence . . ." [4]

To deprive the orphan of the advantage which the additional payments resulting from the higher amount of the German benefit represent, is, indirectly, to deny the migrant worker the right which has thus been recognized by the case-law of the Court.

As regards the *recognition of the right*, even if Article 78 of the regulation is intended to determine a single system of legislation for the purposes of the grant of benefits for orphans *and* of family allowances, the two types of benefit are of a different kind.

The Court held in its judgment in *Laumann* that

"In the system established by Regulation No 1408/71 family allowances are generated by an actual occupation (even if the worker is no longer engaged in such occupation) and the direct and sole recipient is the worker himself." [5]

and that

"The direct and sole recipient of the orphan's pension is the orphan himself

1 — Judgment of 19 February 1981, Case 104/80 *Beeck* [1981] ECR 503, at p. 515, paragraph 12 of the decision.

2 — 9 July 1980, Case 807/79 [1980] ECR 2205, p. 2218, paragraph 6.

3 — 60 months of insurance.

4 — 19 February 1981, Case 104/80 [1981] ECR 503, at p. 513, paragraph 7.

5 — 16 March 1978, Case 115/77 [1978] ECR 805, at p. 815, paragraph 7 of the decision.

and the pension, like other survivors' benefits, constitutes the projection in time of a prior occupation, pursuit of which ceased on the death of the worker." [1]

3. Consequently the application of Article 78 of the regulation is only in conformity with the Treaty in so far as it guarantees to the dependants of workers the highest amount resulting from the combination of the provisions to which they have been subject.

It is not really a "supplement" to a pension. The orphans' benefit for loss of a father (Halbwaisenrente), which is, in any event, due on the basis of the German insurance periods alone for the period of time between the death of the father (1 February 1980) and the date at which the orphan reached 18 years of age (31 October 1981), is *reduced* by the amount of the benefits paid by the Italian institution. Therefore only a part of the German legislation will be applied to the orphan. The Court has recognized the legality of such a differential payment in the matter of family allowances. [2]

Certain difficulties in connection with the relations between the institutions which pay the benefits may indeed arise, but administrative costs or the complications resulting from the proposed interpretation must not restrict the principle of the freedom of movement of workers.

If the application of the principle which I propose should cause a financial imbalance in the relations between insurance institutions of two or more Member States, it would be for the Commission to propose a new system for the distribution of the charges.

In reply to the question submitted, I propose that the Court should rule:

An orphan who is a national of a Member State and who has always lived in that Member State, whose father contributed to the insurance pension scheme of the Member State and of another Member State, is entitled to be paid by the pension insurance institution of the second State a supplement to the pension, which is granted to him by the insurance institution of the State of residence provided that sufficient contributions have been paid in the second State to confer entitlement to an orphan's pension under the legislation of that State.

1 — 16 March 1978, Case 115/77 [1978] ECR 805, at p. 815, paragraph 7 of the decision.

2 — *Rossi*, at p. 844, paragraph 17 of the decision; *Beeck*, at p. 515, paragraphs 12 and 13.