OPINION OF ADVOCATE GENERAL JACOBS
delivered on 22 April 1993 *

Mr President,
Members of the Court,

1. Where persons making social security contributions in Germany are entitled to reimbursement on becoming subject to the special social security scheme for German civil servants, does Community law confer a right to the reimbursement of such contributions on those who become subject to a special scheme for civil servants in another Member State? That is in substance the question referred by the Sozialgericht Reutlingen, which is in the following terms:

'Are Articles 9, 10(2) and 13(2)(d) of Council Regulation (EEC) No 1408/71 to be interpreted as meaning that entitlement to reimbursement of contributions under national law exists even when an employee is a member of a comparable social security scheme for civil servants not under national legislation but under the legislation of another Member State?'

The Community legislation

2. Council 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 (hereafter 'the Regulation') was amended and updated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (Official Journal 1983 L 230, p. 6). Subsequent amendments (see the consolidated version published, for information only, in Official Journal 1992 C 325, p. 1) did not introduce any changes which are relevant to the present case.

3. Article 3(1) of the Regulation provides that:

'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 that State.'

By Article 4(4):

'This Regulation shall not apply to ... special schemes for civil servants and persons treated as such.'

* Original language: English.

Article 9(1) provides that:

'The provisions of the legislation of any Member State which make admission to voluntary or optional continued insurance conditional upon residence in the territory of that State shall not apply to persons resident in the territory of another Member State, provided that at some time in their past working life they were subject to the legislation of the first State as employed or as self-employed persons.'

Special provisions for implementing the legislation on voluntary contributions to German insurance schemes are laid down in paragraph C.7 of Annex VI to the Regulation, which provides in particular that:

'Where the general conditions are fulfilled, voluntary contributions to the German pension insurance scheme may be paid:

...

(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;

...'.

Article 10(2) provides that:

'Where under the legislation of a Member State reimbursement of contributions is conditional upon the person concerned having ceased to be subject to compulsory insurance, this condition shall not be considered satisfied as long as the person concerned is subject to compulsory insurance as an employed or self-employed person under the legislation of another Member State.'

By Article 13(1), persons covered by the Regulation are in principle subject to the legislation of a single Member State, and by Article 13(2)(d), civil servants and persons treated as such are in principle subject to the legislation of the Member State to which the administration employing them is subject.

The background to the case

4. The plaintiff in the main proceedings is a French national who, after having qualified as a teacher in France, was employed in Germany between 1973 and 1977. During that period she made compulsory contributions to a social security scheme for salaried workers. That scheme is administered by the Bundesversicherungsanstalt für Angestellte (Federal Insurance Institution for Salaried Employees), which is the defendant in the main proceedings. The plaintiff's contributions to the defendant's scheme (hereafter 'the German contributions') amounted to a total of less than 60 months, the minimum period of contributions required to obtain a pension on retirement. It appears from the

order for reference that, from 1973, the plaintiff was also required to pay contributions to the French social security scheme for civil servants, notwithstanding that she remained resident in Germany. In 1990 the plaintiff decided to return to France to take up a position there as a civil servant, and she applied for reimbursement of one half of the total amount of the German contributions. The defendant refused her application on 19 September 1990 and rejected her appeal on 11 January 1991. The plaintiff is currently employed by the French administration as a civil servant and is resident in France.

5. It appears that a person who, having made the same contributions as the plaintiff, took up a position as a German rather than as a French civil servant would be entitled to such a reimbursement. He would be so entitled because in those circumstances he would not be permitted to make voluntary contributions to the defendant's scheme, being covered instead by the special scheme for German civil servants. Thus, lack of entitlement to make voluntary contributions is a condition for reimbursement laid down by the applicable German legislation. The plaintiff, in contrast, is entitled to make voluntary contributions, and after a total of 60 months of contributions would be entitled to a German pension at the age of 65. It is to be noted that, by Article 9(1) of the Regulation and paragraph C.7(b) of Annex VI, she continues to have the right to make such contributions even though she now resides in France. It appears however that she would prefer to forgo the right to make voluntary contributions, and receive instead reimbursement of the contributions already made.

Consideration of the question referred

6. The Sozialgericht suggests that the applicable German legislation may be inconsistent with the principle of equal treatment laid down by Community law, and in particular by Article 3(1) of the Regulation, in that it is impossible to interpret the relevant provisions of German law in such a way as to place the plaintiff in the same position as a German civil servant. As we have seen, a German civil servant who has made less than 60 months compulsory contributions will, on taking up his position, be able to claim reimbursement of one half of his total contributions, a right which is not enjoyed by someone taking up a position as a civil servant in another Member State. The Sozialgericht observes that it is not disputed that the pension provided under the German scheme for civil servants is broadly similar to that provided under the French civil service scheme.

7. In order to answer the question referred, two issues must in my view be addressed. The first issue which arises is whether the right to obtain reimbursement from the defendant's scheme must be regarded as an incident of the special scheme for German civil servants. If so, it is clear that the plaintiff cannot claim any right to reimbursement, given that civil service schemes are excluded from the scope of the Regulation by Article 4(4). If however that right is not an incident of the civil service scheme, the question then arises whether the plaintiff is entitled to

equal treatment as compared with a German civil servant, pursuant to Article 3(1) of the Regulation. I shall consider those issues in turn.

(a) Schemes for civil servants

8. According to the German Government, the right to reimbursement enjoyed by German civil servants is to be regarded as an integral part of the special social security scheme for such workers, and as such is excluded from the scope of the Regulation by Article 4(4). The German Government observes that the right to reimbursement is a consequence of the fact that German civil servants are exempt from the requirement to make compulsory contributions to a scheme for ordinary employees and have no right to make voluntary contributions. However, it appears that civil servants who have made at least 60 months of contributions to the defendant's scheme do have the right to continue to make contributions, and that in those circumstances they do not enjoy any right to reimbursement.

9. It can be seen therefore that taking up employment as a German civil servant is not in itself a sufficient condition for the reimbursement of contributions, although it is sufficient where contributions were made for less than 60 months. Nor is it a necessary condition, since it appears that certain other categories of persons who cannot obtain any pension rights from their contributions will enjoy a right to reimbursement, in particular the nationals of non-member States. The right to reimbursement is accordingly not a specific feature of the civil service scheme.

10. In any event, a right to reimbursement of contributions previously made to a scheme for ordinary employees cannot be regarded as an incident of the special scheme for civil servants; such a right is more naturally regarded as an incident of the scheme under which the contributions were made.

11. In my opinion, therefore, the right to reimbursement of contributions made to the defendant's scheme enjoyed by some civil servants is not a matter falling outside the Regulation by virtue of Article 4(4). It is accordingly necessary to consider whether the defendant's refusal to reimburse the plaintiff is contrary to the principle of equal treatment laid down by Article 3(1) of the Regulation.

(b) The right to equal treatment

12. The German Government observes that the plaintiff is placed by its national legislation in the same position as any German employee, other than a civil servant, who has made compulsory contributions to the defendant's scheme and then ceased to be liable to make contributions. Like any such employee the plaintiff has the right to make voluntary contributions, and thereby eventually to obtain a pension, but has no right to reimbursement of contributions already made. At first sight, Article 3(1) of the Regulation would not appear to require anything more. As the German Government pointed out at the hearing, although German civil servants are treated differently from other persons who have ceased to be subject to compulsory insurance after having made less than 60 months of contributions, it is equally the case that they are in a different position from such persons. Unlike a person in the position of the plaintiff, the German civil servant will not enjoy any right to continue to make voluntary contributions. Thus the

right to reimbursement can be regarded as the counterpart of an inability to make voluntary contributions and thereby to accumulate pension rights under the defendant's scheme. The German Government suggests moreover that the right to make voluntary contributions is as a general rule more advantageous than the right to reimbursement since, on the one hand, only one half of the contributions (corresponding to those made by the employee rather than the employer) can be reimbursed, and on the other hand the pension eventually obtained will be index-linked.

13. Depending upon the situation of the person concerned, a right to reimbursement might be thought more advantageous in some cases than a right to make voluntary contributions, whereas in other cases it might be thought less advantageous. It is doubtful whether discrimination can be said to arise in such circumstances: compare Case 810/79 *Überschär* v *Bundesversicherungsanstalt für Angestellte* [1980] ECR 2747, at paragraph 17 of the judgment. Moreover even in an individual case it might be difficult to decide which right is the more advantageous; indeed the two rights may not be strictly comparable, since the former represents an immediate pecuniary benefit whereas the latter corresponds to the possibility of obtaining a future benefit in return for current expenditure. In any event, however, it is clear that the situation of a German civil servant enjoying no right to make voluntary contributions to the defendant's scheme differs in a material respect from the position of the plaintiff.

14. In the Commission's view the plaintiff has the right to be treated in the same way as a German civil servant, and not merely a right to equal treatment as compared with an ordinary German employee. As the Commission points out, Article 3(1) of the Regulation prohibits not only direct discrimination on grounds of nationality, but also indirect discrimination which, by applying other distinguishing criteria, leads in practice to the same result: see Case 1/78 *Kenny* v *Insurance Officer* [1978] ECR 1489, at paragraphs 16 to 20 of the judgment. Those employees who become subject in Germany to the special scheme for civil servants will normally be German nationals, in contrast to migrant workers who return as civil servants to their home Member State, who will normally be citizens of that State. In the Commission's view, the difference in treatment of the two categories of worker accordingly amounts to indirect discrimination contrary to Article 3(1) of the Regulation.

15. Contrary to the view of the Commission, however, it does not seem to me that that difference in treatment can be regarded as discrimination contrary to Article 3(1). It is true that migrant workers returning to work as civil servants in their home State are, as regards reimbursement, placed in a different position from workers taking up a position in the German civil service. On the other hand they are, as we have seen, placed in the same position as any other worker who is a Community national and who ceases to be liable to make compulsory contributions in Germany. Such workers will be able by voluntary contributions to make up the minimum period of 60 months required to obtain entitlement to a pension. It is not clear why Germany should be required to place civil servants in other Member States in the same position as its own civil servants, or

to place migrants returning to work in their home civil service in a different position from migrants returning to work in the private sector. As we have seen, both categories of returning migrants continue to have the right to make voluntary contributions, and both are in that respect in a different position from German civil servants enjoying a right to reimbursement. It is clear that the principle of equal treatment laid down by Community law does not require the equal treatment of cases which differ in a material respect. It seems to me therefore that, for the purposes of Article 3(1), the plaintiff's continuing right to make voluntary contributions constitutes a sufficient reason for refusing reimbursement of her previous contributions.

16. The position might of course be different if German law did not provide any worker with the right to make voluntary contributions. If German civil servants were then given a right to reimbursement of their compulsory contributions, while other categories of worker enjoyed no such right, a case of indirect discrimination against non-Germans might be made out. It is to be noted however that in such circumstances nothing would turn upon whether the worker in question intended to work as a civil servant in his home State. The discrimination in question would be one suffered by all non-Germans who had made compulsory contributions and who, because they were not German, were members of a group which was less likely to benefit from the right to reimbursement enjoyed by German civil servants.

17. In the present case, the Commission suggests that migrants returning to work in the private sector should be treated differently from those who, on their return, are subject to a special social security scheme for civil servants, because the two groups enjoy different rights under Regulation No 1408/71. Unlike the former, members of the latter group may not be able to benefit from the provisions of Article 46 of the Regulation, which applies to persons who have been subject to the social security legislation of more than one Member State. For the purposes of the award of pension benefits, Article 46(2) requires a period of insurance completed under the legislation of a Member State to be taken into consideration even where the period is insufficient to give rise to an entitlement to benefit under that legislation. Thus a migrant who completes less than 60 months insurance contributions in Germany, and who then returns to work in the private sector in another Member State, may be able to have his German contributions taken into account. In contrast, a migrant who on his return is covered by a special scheme for civil servants will enjoy no such right. That follows from the fact that the special scheme is excluded from the scope of the Regulation by Article 4(4), so that the migrant cannot be regarded as having been subject to the legislation of more than one Member State solely as a result of having previously worked in Germany.

18. It is clear however that the difference highlighted by the Commission is not the result of unequal treatment under national legislation, but is rather a consequence of the provisions of Regulation No 1408/71 itself, and in particular the exclusion of civil service schemes by Article 4(4). A Member State is not in my view required to ensure that the exclusion of civil service schemes from the scope of the Regulation does not disadvantage migrants returning to work as civil servants in their home State as compared with those who return to work in the private sector. In particular, a Member State is not required to make any provision for the reimbursement of contributions in such circumstances. As we have seen, it is sufficient in the present case that migrants returning to their home State, after having worked in Germany, have the same right to make voluntary contributions as any other worker who was compulsorily insured in Germany.

19. It would in my view be an error to suppose that a Member State is required to ensure that migrant workers returning to work as civil servants in other Member States are placed in the same position as its own civil servants. That might in any event be impossible, since the national schemes for civil servants may in some cases vary considerably. Full equality of treatment could therefore only be achieved by Community provisions which harmonized the social security legislation of the Member States; it is clear however that the purpose of the Regulation is only to coordinate, and not to harmonize, national social security schemes: see Case 41/84 *Pinna* v *Caisse d'allocations familiales de la Savoie* [1986] ECR 1, at paragraph 20 of the judgment. Furthermore, civil service schemes are in any event outside the scope of the Regulation. The Regulation cannot therefore be interpreted as imposing any requirement that civil servants in different Member States should enjoy similar benefits or be subject to similar obligations.

20. In my opinion, therefore, the principle of equal treatment laid down by Article 3(1) of the Regulation is not infringed by a refusal to reimburse social security contributions in circumstances such as those of the present case.

21. I would add moreover that such a refusal is consistent also with the other provisions of the Regulation which are mentioned in the order for reference. As we have seen, Article 9(1) prevents Member States from making the right to voluntary continued insurance conditional upon a worker continuing to reside in that State. Article 9(2) provides for periods of insurance in other Member States to be taken into account, if necessary, in granting such a right. There is however no question that the plaintiff enjoys a right to voluntary insurance; indeed, it is precisely that right which she wishes to renounce in favour of a right to reimbursement. The plaintiff's right to make voluntary contributions is guaranteed, furthermore, by the special provisions for the application of German insurance schemes laid down by paragraph C.7 of Annex VI to the Regulation, cited above in paragraph 3. It can be seen, therefore, that the scheme of the Regulation is to protect the position of migrants by ensuring that they can acquire or retain any right to make voluntary contributions

normally available under national law, rather than by allowing them to claim reimbursement of contributions already made. Moreover it will be observed that Article 10(2) imposes a limitation on the right to reimbursement of contributions under the legislation of a Member State; it does not provide for any enlargement of such rights. That provision is however not directly relevant to the present case, since by Article 4(4) the plaintiff's membership of the French civil service scheme cannot be regarded as 'compulsory insurance' for the purposes of the Regulation.

Conclusion

22. I am accordingly of the opinion that the question referred by the Sozialgericht Reutlingen should be answered as follows:

Article 3(1) of Council 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, does not require a Member State to reimburse compulsory social security contributions made by a person who subsequently takes up a position in another Member State in which he is covered by a special scheme for civil servants, but who continues to have the right to make voluntary contributions in the first State, notwithstanding that a person who had made the same contributions under the legislation of the first State and who subsequently took up a position as a civil servant in that State would have a right to reimbursement of his contributions.