OPINION OF ADVOCATE GENERAL JACOBS

delivered on 30 November 2000 [1]

1. The basic Community regulation on social security, Regulation No 1408/71, [2] is expressed to apply not only to Community nationals but also to stateless persons and refugees. These cases raise two principal questions concerning the validity and interpretation of the Regulation: first, was the Council competent to include stateless persons and refugees in its personal scope and secondly, if so, does it apply to such persons who have travelled directly to a Member State from a non-member country and have not moved within the Community where there is no other Community cross-border element. Additionally the Court is asked whether, in the event of affirmative answers to the two principal questions, certain family benefits are payable by virtue of the Regulation.

Regulation No 1408/71 and its legal basis

2. Article 51 of the EC Treaty (now, after amendment, Article 42 EC) provided:

'The Council shall, acting unanimously on a proposal from the Commission, adopt such measures in the field of social security as are necessary to provide freedom of movement for workers; to this end, it shall make arrangements to secure for migrant workers and their dependants:

(a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of several countries;

(b) payment of benefits to persons resident in the territories of Member States.'

1 — Original language: English.

2 — The latest consolidated version is that published as Part I of Annex A to Council Regulation (EC) No 118/97 of 2 December 1996 amending and updating 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 (EEC) No 1408/71, OJ 1997 L 28, p. 1. Although Regulation No 118/97 entered into force after the competent authorities had taken the decisions contested in the main proceedings in these cases, the relevant provisions are the same.

3. Article 235 of the EC Treaty (now Article 308 EC) provided:

'If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.'

4. Regulation No 1408/71 (successor to Regulation No 3 of 1958, [3] of which more below) in its original version covered employed persons only: it was entitled 'Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community'. [4] That original version was based in particular on Articles 2, 7 [5] and 51 of the EC Treaty [6] (Articles 2 and 7 are now, after amendment, Articles 2 and 12 EC).

5. Article 2(1) of that version of the Regulation provided:

'This Regulation shall apply to workers who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as also to members of their families and their survivors.'

6. In 1981 Regulation No 1408/71 was extended to self-employed persons and members of their families by Regulation No 1390/81. [7] Regulation No 1390/81 is based in particular on Articles 2, 7, 51 and 235 of the Treaty. [8] Curiously, Regulation No 1390/81 makes no amendment to the preamble to Regulation No 1408/71 to explain that extension; that was apparently not done until 1997, when Council Regulation (EC) No 118/97 of 2 December 1996 [9] replaced the title, preamble, table of contents and provisions of Regulation No 1408/71 with a new updated text reflecting numerous amendments which had been made since the 1983 updating (which did not refer to the preamble). [10] The preamble as updated in 1997 refers by

3 — Regulation No 3 of the Council of 25 September 1958 concerning social security for migrant workers, JO 1958, p. 561.

4 — OJ 1971 L 149, p. 2.

5 — Renumbered as Article 6 by the Treaty on European Union.

6 — First citation in the preamble.

7 — Council Regulation (EEC) No 1390/81 of 12 May 1981 extending to self-employed persons and members of their families Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, OJ 1981 L 143, p. 1.

8 — First citation in the preamble.

9 — Cited in note 2; entered into force on 1 February 1997.

10 — Council Regulation (EEC) No 2001/83 of 2 June 1983 amending and updating Regulation (EEC) No 1408/71 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71, OJ 1983 L 230, p. 6.

way of legal basis to Articles 51 and 235 in particular.

7. Article 2(1) and 2(2) of the Regulation as extended in 1981 and as in force at the material time provide:

'1. This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States or who are stateless persons or refugees residing within the territory of one of the Member States, as well as to the members of their families and their survivors.

2. In addition, this Regulation shall apply to the survivors of employed or self-employed persons who have been subject to the legislation of one or more Member States, irrespective of the nationality of such employed or self-employed persons, where their survivors are nationals of one of the Member States, or stateless persons or refugees residing within the territory of one of the Member States.'

8. Article 1(a) gives a very broad definition of 'employed person' and 'self-employed person' so as essentially to cover any person insured on any basis against any of the contingencies covered by the branches of social security dealt with in the Regulation. The Regulation accordingly covers persons in receipt of unemployment benefit as well as persons in employment.

9. Article 3(1) provides:

'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.'

10. Article 4(1) provides that the Regulation is to apply to all legislation concerning the branches of social security there listed. Those include 'family benefits', which cover both the child benefit and the child-raising allowance at issue in the main proceedings. [11]

11 — See the definition of 'family benefits' in Article 1(u)(i) of the Regulation and, with regard to the child-raising allowance, the judgment of the Court in Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* v *Land Nordrhein-Westfalen* [1996] ECR I-4895, paragraph 27.

The facts and the main proceedings

11. Cases C-95/99 *Khalil*, C-97/99 *Osseili* and C-98/99 *Nasser* each concern a husband and wife who are Lebanese Palestinians and who entered Germany from the Lebanon in the 1980s as civil-war refugees. They have lived in Germany continuously since then and have there been refused recognition as political refugees. During the period in issue, the family in *Khalil* survived on unemployment benefit paid to the applicant's husband and on supplementary social assistance, while in *Osseili* and *Nasser* the applicant husband was earning.

12. Case C-96/99 *Chaaban* concerns a husband and wife who are Kurds from the Lebanon and who entered Germany from the Lebanon in 1985 as civil-war refugees. They have lived in Germany continuously since then and have there been refused recognition as political refugees. The applicant husband was employed during the period in issue.

13. Case C-180/99 *Addou* concerns an Algerian national whose husband at the material time had Moroccan nationality. The spouses entered Germany in 1988 from Algeria and Morocco respectively and have since then lived continuously in Germany. The applicant wife unsuccessfully sought recognition as a refugee; her husband was however recognised in January 1994 as a refugee and has subsequently [12] become a German national. He was employed during the period in issue.

14. The first four cases (*Khalil*, *Chaaban*, *Osseili* and *Nasser*) all concern entitlement to child benefit (*Kindergeld*) while *Addou* concerns entitlement to child-raising allowance (*Erziehungsgeld*). From 1 January 1994 the national legislation governing those benefits [13] was amended [14] so as to make entitlement of non-nationals conditional on possession of a residence entitlement (*Aufenthaltsberechtigung*) or a residence permit (*Aufenthaltserlaubnis*); possession of a residence authorisation (*Aufenthaltsbefugnis*) had previously been but was no longer sufficient.

15. The Bundessozialgericht (Federal Social Court) explains in the orders for reference that the intention of the legislature in introducing the new rule was to restrict entitlement to child benefit or child-raising

12 — Presumably after the period to which the claim relates, although this is not expressed.

13 — The Bundeskindergeldgesetz (Federal Law on Child Benefit) in the version of 30 January 1990, BGBl. I, p. 149 and the Bundeserziehungsgeldgesetz (Federal Law on Child-Raising Allowance) in the version of 9 July 1990, BGBl. I, p. 1354.

14 — For the Law on Child Benefit, by Article 5(1) of the First Law implementing the programme for savings, consolidation and growth of 21 December 1993 (BGBl. I, p. 2353); for the Law on Child-Raising Allowance, by Article 4(1) of the Law implementing the Federal Consolidation Programme of 23 June 1993 (BGBl. I, p. 944).

allowance to such foreigners as would normally be expected to remain in Germany permanently; the legislature made this assumption solely in the case of those with residence entitlement or holding a residence permit. As a residence document, residence authorisation occupies, under the scheme of the Ausländergesetz (Law on Aliens), a lower rank than residence entitlement or a residence permit. That category was created in particular for *de facto* refugees, namely foreigners whose residence on Federal territory is permitted solely on humanitarian grounds, for example because of civil war in their homeland.

16. Mrs Khalil, Mr Chaaban, Mr Osseili and Mr Nasser were denied child benefit in respect of their children on the ground that they did not possess the requisite entitlement or permit. Mrs Addou was denied child-raising allowance in respect of her daughter on the same ground.

17. In each case the applicant appealed unsuccessfully against the decisions denying entitlement. All cases were pursued by the applicants and ultimately came before the Bundessozialgericht. In the first four cases it was argued by the applicants before the national courts that either the applicant (in *Khalil*, *Osseili* and *Nasser*) or the applicant's spouse (in *Chaaban*) was stateless and that by virtue of the combined provisions of Articles 2(1) and 3(1) of the Regulation they should be treated in the same way, with regard to entitlement to benefits within the scope of the Regulation, as Germans and other citizens of the Member States of the European Union, with the result that possession of specific residence documents was immaterial. In *Addou* the Landessozialgericht (Higher Social Court) ruled that the applicant, as a member of the family of a recognised refugee, had to be treated in the same way as citizens of the Union.

18. The Bundessozialgericht however doubted whether there was an adequate legal basis for the inclusion of stateless persons and refugees within the persons covered by the Regulation. It accordingly stayed proceedings and referred a series of questions to the Court. In all the cases, the Bundessozialgericht's first two questions are first whether Regulation No 1408/71 applies to stateless persons or refugees and their families if such persons have no right of free movement under the EC Treaty and secondly, if so, whether the Regulation applies to such persons who have travelled directly to a Member State from a non-member country and not moved within the Community. If so, the Court is additionally asked whether a family benefit is payable where one spouse is a national of a non-member State and an employed person and the other is a stateless person and not an employed person (in *Chaaban*) or where

one spouse is a refugee and an employed person and the other is not a national of a Member State or an employed person or a recognised refugee (in *Addou*).

Analysis of the first question

19. Article 48 of the EC Treaty (now, after amendment, Article 39 EC), the first article in Chapter 1 of Title III (Free movement of persons, services and capital) of the Treaty, provided for the freedom of movement of workers within the Community. Despite some early suggestions that Article 48 did not require that a worker be a national of a Member State in order to benefit from the right of free movement, [15] it is settled law that that provision guarantees free movement only to Community nationals (now citizens of the Union). [16]

20. Article 51, set out above, [17] also contained in Chapter 1 of Title III, requires the Council to adopt such social security measures as are necessary to provide freedom of movement for workers, including aggregation and export of benefits.

21. The Regulation applies in terms to stateless persons and refugees, [18] who as such — not being Community nationals — have no right of free movement under the EC Treaty. The issue therefore is whether the Council was competent, when adopting the Regulation, to include such persons in its personal scope.

22. It might be thought unnecessary to answer the first question, since the answer which I consider must be given to the second question is, as will be seen, sufficient to enable the referring court to give judgment in the cases before it. None the less, the first question raises an important and novel issue of principle on which the Court should in my view rule.

The historical context of Article 51 and the Regulation

23. It is helpful in my view to start by considering the issue in its historical context.

15 — See e.g. Richard Plender, 'An Incipient Form of European Citizenship', in *European Law and the Individual* (1976).

16 — Case 238/83 *Caisse d'Allocations Familiales* v *Couple Meade* [1984] ECR 2631, paragraph 7 of the judgment.

17 — See paragraph 2.

18 — See Article 2(1) and 2(2), set out in paragraph 7 above.

24. For this purpose the starting point is perhaps the Convention relating to the status of refugees, signed at Geneva on 28 July 1951, [19] and the Convention relating to the status of stateless persons, signed at New York on 28 September 1954. [20] (The origins of both those conventions can in fact be traced back to the immediate aftermath of the Second World War. Shortly after its creation, the United Nations Commission on Human Rights appointed a working party to consider the problem of statelessness. Subsequently the Commission adopted a resolution expressing the wish that 'early consideration be given by the United Nations to the legal status of stateless persons... in particular... as regards their legal and social protection'. That ultimately led to a decision by the Economic and Social Council to appoint a committee on refugees and stateless persons, which started work in 1950. On the committee's recommendation, the Economic and Social Council passed resolutions calling on the International Law Commission to prepare the necessary draft documents to form the basis for an international agreement on the elimination of statelessness. The committee itself prepared a draft convention on the status of refugees.) [21]

25. The original six Member States of the European Communities were signatories to both conventions.

26. The Geneva convention sought to 'revise and consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such instruments'. [22] The bedrock of the convention was the principle affirmed by the Charter of the United Nations and the Universal Declaration of Human Rights that human beings should enjoy fundamental rights and freedoms without discrimination. [23] Article 24 of the Geneva Convention, headed 'Labour legislation and social security', provides in so far as relevant:

'1. The Contracting States shall accord to refugees lawfully staying in their territory the same treatment as is accorded to nationals in respect of the following matters:

...

(b) social security (legal provisions in respect of employment injury, occupational diseases, maternity, sickness, disability, old age, death, unemployment, family responsibilities and any other contingency which, according to

19 — United Nations Treaty Series, vol. 189, p. 150, No 2545 (1954).

20 — United Nations Treaty Series, vol. 360, p. 130, No 5158 (1960).

21 — See A Peter Mutharika, *The Regulation of Statelessness under International and National Law* (1989), pp. 28 to 34.

22 — Third recital in the preamble.

23 — First recital in the preamble.

national laws or regulations, is covered by a social security scheme)...'

27. The New York convention, also based on the principle that human beings should enjoy fundamental rights and freedoms without discrimination,[24] sought to regulate and improve the status of stateless persons.[25] Article 24, headed 'Labour legislation and social security', confers the same protection on stateless persons as Article 24 of the Geneva convention confers on refugees.

28. In addition, Article 7 of each convention provides:

'Except where this Convention contains more favourable provisions, a Contracting State shall accord to [refugees / stateless persons] the same treatment as is accorded to aliens generally.'

29. On 11 December 1953 — and thus between the signing of the Geneva and the New York conventions — the six original Member States signed two Council of Europe conventions, namely the European interim agreement on social security schemes relating to old age, invalidity and survivors[26] and the European interim agreement on social security other than schemes for old age, invalidity and survivors.[27]

30. The two Council of Europe agreements were based on the principle that the nationals of any Contracting State should under the social security legislation of any other Contracting State receive equal treatment with the latter State's nationals. Protocols signed by the original six Member States on the same date as the two agreements extended the provisions of the agreements to refugees under the same conditions as they applied to the nationals of the Contracting States; 'refugee' was defined in accordance with the Geneva convention.[28]

31. Meanwhile on 18 April 1951 the original six Member States had signed the Treaty establishing the European Coal and Steel Community. Article 69 of that Treaty provides in so far as is relevant:

'1. Member States undertake to remove any restriction based on nationality upon

24 — First recital in the preamble.
25 — Fourth recital in the preamble.
26 — European Treaty Series, Volume 1, No 12.
27 — European Treaty Series, Volume 1, No 13.
28 — Article 1 of each Protocol.

the employment in the coal and steel industries of workers who are nationals of Member States and have recognised qualifications in a coalmining or steelmaking occupation, subject to the limitations imposed by the basic requirements of health and public policy.

...

4. [Member States] shall prohibit any discrimination in remuneration and working conditions between nationals and migrant workers, without prejudice to special measures concerning frontier workers; in particular, they shall endeavour to settle among themselves any matters remaining to be dealt with in order to ensure that social security arrangements do not inhibit labour mobility.'

32. On 9 December 1957 the six original Member States of the European Coal and Steel Community signed the European convention on social security for migrant workers. The preamble to that convention affirms the principle of equal treatment for all nationals of Contracting Parties and for stateless persons and refugees resident on the territory of a Contracting Party in the application of national social security legislation. [29] 'Refugee' is defined in accordance with the Geneva convention; [30] 'stateless person' is not defined.

33. The convention sought to coordinate national social security regimes, [31] principally by requiring (i) the aggregation of insurance periods completed under the legislation of a Contracting State other than the State of residence [32] and (ii) the payment of certain benefits to persons resident in another Contracting State. [33] The convention applied to 'wage-earners or assimilated workers who are or have been subject to the legislation of one or more of the Contracting States and are nationals of a Contracting State or are stateless persons or refugees permanently resident in the territory of a Contracting State, as also to the members of their families and their survivors.' [34]

34. Less than a year later, on 25 September 1958, the Council of the European Economic Community adopted Regulation No 3 concerning social security for migrant

29 — Seventh recital.
30 — Article 1(k).
31 — Fifth recital in the preamble.
32 — Article 9(1).
33 — Article 10.
34 — Article 4(1).

workers. That regulation was based on Articles 51 and 227(2) of the Treaty. [35]

35. The first six recitals in the preamble to Regulation No 3 state:

'Whereas a European Convention on social security for migrant workers, prepared with the assistance of the International Labour Office, was signed at Rome on 9th December, 1957, by the Governments of the Member States of the European Coal and Steel Community,

Whereas that Convention was signed before the Treaty setting up the European Economic Community came into force,

Whereas the institutions of the Community are required under the said Treaty to take measures for the progressive establishment of the free movement of labour,

Whereas an essential element in the establishment of the free movement of labour is a system securing for migrant workers and their dependants, firstly the aggregation of all periods reckoned, under the national legislation of the several countries, for the purposes of opening and maintaining rights to benefit and for calculating the same and secondly the payment of benefits to persons resident in the territories of the Member States,

Whereas the abovementioned Convention meets the objectives of Article 51 of the Treaty and its provisions can accordingly be embodied, with the necessary adaptations, in a Regulation adopted in the manner laid down in the said Article 51,

Whereas the High Authority of the European Coal and Steel Community has declared that the system laid down by the following Regulation can replace the arrangements laid down in Article 69(4) of the Treaty setting up the European Steel and Coal Community...'

36. Regulation No 3 indeed replicates almost verbatim the European convention: in the words of Advocate General Lagrange in 1964, 'as its preamble states, Regulation

35 — Article 227(2) (now, after amendment, Article 299(2)) contained provisions governing the application of Community legislation to Algeria and the French overseas departments.

No 3 is only a reproduction of a convention on social security which has already been signed but has not yet entered into force'.[36] In particular, its Article 4(1) reads:

'The provisions of this Regulation shall apply to wage-earners or assimilated workers who are or have been subject to the legislation of one or more of the Member States and are nationals of a Member State or are stateless persons or refugees permanently resident in the territory of a Member State, as also to the members of their families and their survivors.'

37. To conclude this survey of the historical context of the legislation at issue, I would note that Article 2(1) of Regulation No 1408/71 is in substantially identical terms, subject to the words 'wage-earners or assimilated workers' having been replaced by 'workers' in the original version and subsequently by 'employed or self-employed persons' in the 1981 amendment.

38. The historical nexus is explicitly confirmed in the preamble to Regulation No 1408/71, the final recital in which states:

'Whereas the present Regulation may replace the arrangements provided for in Article 69(4) of the Treaty establishing the European Coal and Steel Community'.

39. The inclusion of refugees and stateless persons in the personal scope of Regulation No 3 of 1958 and subsequently of Regulation No 1408/71 thus — as the Commission observes — simply reflected international obligations already undertaken (both at the level of the United Nations and within the Council of Europe) by the six original Member States. As a result of those obligations, national law already assimilated refugees and stateless persons to nationals for social security purposes, whereas the treatment of foreign nationals depended upon reciprocity or bilateral or multilateral arrangements. In the Europe of the 1950s, grappling with the aftermath of the Second World War, it was undoubtedly felt that it would be politically and morally unacceptable for one of the very first regulations adopted by the fledgling European Economic Community to exclude a category of persons who had been expressly included in and protected by the earlier agreements and conventions binding on the original Member States.

36 — Case 75/63 *Hoekstra* v *Bedrijfsvereniging Detailhandel* [1964] ECR 177.

The Court's case-law on the personal scope of the regulations

40. Before turning to the central question whether the inclusion of refugees and stateless persons in the personal scope of Regulation No 3 and Regulation No 1408/71 is compatible with Article 51 of the Treaty, it may be useful to consider the cases in which the Court appears to have endorsed that inclusion, albeit implicitly.

41. The principal case is *Rzepa*, [37] in which the Court ruled on the entitlement under Regulation No 3 of a refugee (and former worker) to an invalidity benefit without questioning the validity of that regulation. The Court may therefore be considered to have implicitly recognised the need to coordinate national social security legislation with regard to stateless persons and refugees.

42. There are in addition a number of cases in which the Court has explicitly referred to the inclusion of refugees and stateless persons in the personal scope of Regulation No 1408/71 without questioning the lawfulness of that inclusion, which again might be taken to suggest implicit endorsement. [38]

43. It may also be noted that in *Zaoui*, [39] it seems to have been assumed by both the Court and Advocate General da Cruz Vilaça that if the applicant had been a stateless person he could have relied on Article 2(1) of Regulation No 1408/71.

44. While the statements of the Court in those cases were not made in the context of challenges to the lawfulness of including refugees and stateless persons in the personal scope of Regulations No 3 of 1958 and No 1408/71, they none the less demonstrate that the Court, when called upon to analyse the provisions referring to refugees and stateless persons in proceedings raising questions of interpretation of the regulations, has not baulked at their inclusion in the regulations' personal scope. Those statements accordingly provide some support for the view that the inclusion of refugees and stateless persons is not *prima facie* unlawful.

37 — Case 35/74 *Mutualités Chrétiennes* v *Rzepa* [1974] ECR 1241.

38 — See Case 40/76 *Kermaschek* v *Bundesanstalt für Arbeit* [1976] ECR 1669, paragraph 7 of the judgment and the Opinion of Advocate General Reischl, p. 1682; *Meade*, cited in note 16, paragraph 3 of the Opinion of Advocate General Mancini; Case C-308/93 *Bestuur van de Sociale Verzekeringsbank* v *Cabanis-Issarte* [1996] ECR I-2097, paragraph 21 of the judgment; and Case C-131/96 *Mora Romero* v *Landesversicherungsanstalt Rheinprovinz* [1997] ECR I-3659, paragraph 21 of the judgment.

39 — Case 147/87 *Zaoui* v *Cramif* [1987] ECR 5511, paragraph 10 of the judgment and paragraph 40 of the Opinion of Advocate General da Cruz Vilaça.

The Court's approach to the interpretation of Article 51

45. The Bundessozialgericht in its order for reference states its view that the Council is, under the Treaty, in principle not entitled to extend the scope *ratione personae* of the regulations which it adopts beyond the group of persons determined and defined in accordance with the legal basis underlying the regulation in question. Under the first paragraph of Article 51, the Council is required to 'adopt such measures in the field of social security as are necessary to provide freedom of movement for workers'. According to its wording, therefore, the Council is limited to adopting coordination rules for Union citizens having the status of migrant workers, since they alone enjoy the right of free movement.

46. That view is to my mind difficult to reconcile with this Court's approach to the regulations. Although it is of course true that Regulation No 3 of 1958 and Regulation No 1408/71 were both based principally on Article 51 of the EC Treaty, the Court in interpreting those regulations has consistently given a broad construction to that article and hence to the personal scope of the regulations based thereon. Thus, as the Swedish Government observes, it is now settled law that the definition of worker used in the context of that article and of Regulation No 1408/71 does not necessarily coincide with that used in Article 48.[40] It is useful to trace the development of that principle.

47. The first indication is perhaps to be found in the Court's suggestions at an early stage that the objectives of Article 51 are not limited to the two specific aims there expressed (namely (a) aggregation of periods of insurance and employment and (b) export of benefits). Thus in *Hoekstra*[41] — the first case on Regulation No 3 — Advocate General Lagrange pointed out that the provisions contained in Article 51(a) and (b) were not exclusive, being preceded by the word 'notamment',[42] and the Court referred to the 'principal' objective of Article 51.[43] Similarly in *Singer*[44] the Court referred to the 'objectives' of Article 51. That may be seen to imply that other objectives may also be attained on the basis of Article 51 and in the context of Regulation No 1408/71. It is striking that Article 51 in the first four official languages of the Community — namely French, German, Italian and Dutch — uses a term meaning 'in particular',[45] which clearly supports that view.

40 — Case C-85/96 *Martínez Sala* v *Freistaat Bayern* [1998] ECR I-2691, paragraph 31 of the judgment.

41 — Cited in note 36.

42 — P. 193.

43 — P. 184.

44 — Case 44/65 *Hessische Knappschaft* v *Singer* [1965] ECR 965, at p. 971.

45 — *Insbesondere* (German), *in particolare* (Italian) and *met name* (Dutch).

48. In *Hoekstra*, decided in 1964, the Court appeared to assume that the concept of 'worker' for the purpose of Articles 48 and 51 was the same, although it ruled that the 'worker' protected under Regulation No 3 of 1958 'is not exclusively one who is currently employed'.[46] The following year however Advocate General Gand laid the groundwork for the future case-law, stating in *Singer* that Articles 51 and 48 did not necessarily cover the same field.[47]

49. As the Court's case-law developed, it became increasingly clear that Article 51 — and hence the personal scope of the regulations made under it — was to be construed more widely than Article 48. In *Singer*, the Court refused to rule that Article 52 of Regulation No 3,[48] which had been interpreted by the Court as applying to a former non-migrant worker not currently employed but paying voluntary insurance contributions in the expectation of resumption of work,[49] to a non-migrant worker who suffered an accident on his route to work which took him across the territory of another Member State[50] and to a frontier worker who had suffered an accident unconnected with his employment,[51] was unlawful because the Council in adopting it acted *ultra vires* and exceeded the powers which it derived from Article 51 of the Treaty. Advocate General Gand, in an Opinion which was followed by the Court and which proposed that Article 52 of Regulation No 3 should equally apply where a worker resident and employed in one Member State had an accident in another Member State unconnected with his work, described the Court's earlier interpretation of Article 52 of Regulation No 3 as resulting from 'the very wide notion which [the Court has] conceived of the scope *ratione personae* of Regulation No 3'.[52]

50. The Court continued to give a broad interpretation of Article 51 and the scope of the regulations in the 1960s and 1970s. Thus in *Vaassen*[53] the Court ruled that Regulation No 3 applied to the widow of a non-migrant worker where the only international element was that the widow, who was not a worker, had changed her residence; and in *De Cicco*[54] the Court assimilated a craftsman to a wage-earner, thus widening the personal scope of Regulation No 3. The Court in *De Cicco* stated that Article 4 of Regulation No 3, which set out its personal scope, 'is based on a wide conception of the persons to whom it applies... In this respect Article 4 follows a general tendency of the social law of Member States to extend the benefits of

46 — Pp. 184 and 185.

47 — P. 977.

48 — Which governed the situation where a recipient of benefits from one Member State was injured in another Member State.

49 — *Hoekstra*, cited in note 36.

50 — Case 31/64 *Sociale Voorzorg* v *Bertholet* [1965] ECR 81.

51 — Case 33/64 *Betriebskrankenkasse Heseper Torfwerk* v *Koster* [1965] ECR 97.

52 — Case 27/69 *Entr'aide Médicale* v *Assurances Générales* [1969] ECR 405, at p. 415.

53 — Case 61/65 *Vaassen* v *Beambtenfonds Mijnbedrijf* [1966] ECR 261.

54 — Case 19/68 *De Cicco* v *Landesversicherungsanstalt Schwaben* [1968] ECR 473, at p. 480.

social security in favour of new categories of persons by reason of identical risks.'

51. The Court repeated its statement in *De Cicco* in *Janssen*,[55] in which it assimilated to a wage-earner a self-employed helper on a farm, and in *Brack*,[56] in which it held that Regulation No 1408/71 (before the 1981 amendment extending its personal scope to self-employed persons and members of their families) applied to a person who was self-employed when the contingency insured against (sickness) occurred. Advocate General Mayras observed in *Brack* that, 'on the eve of the [1973] accession of the new States, the Community regulations and the British scheme — like the social security schemes in most of the Member States — had developed along similar and converging lines demonstrating the generalisation of the trend towards protecting the whole of the population'.[57]

52. In *Mr and Mrs F* the Court ruled that the combined effect of Articles 2(1) and 3(1) of Regulation No 1408/71 was that the members of an employed person's family who were not and had never been workers within the meaning of the Regulation must benefit from the social legislation of the State of their residence on the same terms as that State's nationals. Advocate General Trabucchi had echoed Advocate General Mayras, stating:[58]

'If we want Community law to be more than a mere mechanical system of economics and to constitute instead a system commensurate with the society which it has to govern, if we wish it to be a legal system corresponding to the concept of social justice and to the requirements of European integration, not only of the economy but of the people, we cannot disappoint the [referring] court's expectations [of assistance in eliminating a situation which would conflict with its conscience].'

53. In *Inzirillo*,[59] the Court ruled that a handicapped minor remained within the scope of the Regulation even on attaining majority, although he could not work, thus continuing the pattern of giving a wide construction to Regulation No 1408/71 and hence to Article 51. That trend continues: in recent years the Court has ruled that the coordinating rules in the Regulation apply also to persons who have not moved within the Community provided that their situation involves a cross-border element necessitating a coordination of

55 — Case 23/71 *Janssen* v *Mutualités Chrétiennes* [1971] ECR 859, paragraphs 6 and 8 of the judgment.

56 — Case 17/76 *Brack* v *Insurance Officer* [1976] ECR 1429, paragraph 20 of the judgment.

57 — P. 1462.

58 — Case 7/75 *Mr and Mrs F* v *Belgian State* [1975] ECR 679, at p. 697.

59 — Case 63/76 *Inzirillo* v *Caisse Allocations Familiales Lyon* [1976] ECR 2057.

social security legislation [60] and has confirmed that the definition of worker used in the context of Article 51 and Regulation No 1408/71 does not necessarily coincide with that used in Article 48. [61]

54. I will conclude this survey by mentioning two cases concerning the status of Community nationals who had worked in Algeria in which the Court endorsed the retention in the geographical scope of Regulation No 3 (set out in Annex A to the Regulation) of Algeria during the period from its independence on 1 July 1962 until 18 January 1965, thus accepting that the Council was competent to legislate on the basis of Article 51 so as to assimilate the territory of a third country to that of a Member State. [62]

55. It may finally be noted in the context of the respective scopes of Articles 48 and 51 that Regulation No 1408/71 applies to civil servants [63] who are expressly excluded from the scope of Article 48. [64]

60 — Case C-194/96 *Kulzer* v *Freistaat Bayern* [1998] ECR I-895, paragraph 31 of the judgment.

61 — *Martínez Sala*, cited in note 40, paragraph 31 of the judgment.

62 — Case 110/73 *Fiege* v *Assurance Maladie de Strasbourg* [1973] ECR 1001 and Case 6/75 *Horst* v *Bundesknappschaft* [1975] ECR 823.

63 — Article 2(3).

64 — Article 48(4).

56. It is thus to my mind abundantly clear that Article 51 has a considerably wider scope that Article 48. The scope of regulations made under Article 51 may thus be wider than the scope of Article 48: that is amply demonstrated by the Court's consistent approach to the interpretation of both Article 51 and the regulations made thereunder.

Conclusion on the first question

57. All three matters considered above — the historical context in which refugees and stateless persons were included in the personal scope of the regulations, the Court's repeated implied acceptance of that inclusion and the Court's consistent broad interpretation of the personal scope of Article 51 and the regulations made thereunder — coincide in supporting the view that the Council was competent to include refugees and stateless persons in the personal scope of regulations made under Article 51.

58. As has been seen, from a historical perspective Regulation No 3 did no more than take over the acquis: the original Member States were already bound by

international conventions and by Council of Europe agreements to accord refugees and stateless persons the same treatment as their nationals. As the Commission observes, it is clear from the protocols to the Council of Europe agreements that refugees were covered only to the extent that nationals of the contracting parties benefited from rights under the agreements and that they could enjoy those rights only in the context of cross-border relations between contracting parties, but not within their host country since the agreements did not apply to purely internal relations between a contracting party and its own nationals working within the country. The European Convention and subsequently Regulations No 3 and No 1408/71 in effect reflected that approach.

59. Moreover Regulation No 3, like its sequel Regulation No 1408/71, made no separate provision for refugees and stateless persons but merely assimilated them to nationals of a Member State — as they were already assimilated by virtue of international law obligations — for the purpose of coordinating national social security systems. That assimilation may be seen as necessary in order to make the system coherent, since the alternative would have been for Member States to have two separate coordination regimes, one for Community nationals and the other for refugees and stateless persons. As pointed out by the United Kingdom and the Commission, parallel systems would inevitably be administratively complex and give rise to practical problems which could easily be avoided by the simple expedient of including refugees and stateless persons in the personal scope of the Community regulations.

60. In the light of the above, the inclusion of refugees and stateless persons in the personal scope of Regulation No 1408/71 may be regarded as ancillary to the principal objectives of Article 51 and the regulations made under it and hence as lawful. That inclusion was necessary in order for there to be effective coordination, but since its scope and effect are extremely limited, it can properly be regarded as ancillary to the objective of coordination.

61. Moreover, it is important to bear in mind that neither Regulation No 3 nor Regulation No 1408/71 confers on persons within their scope any independent rights to social security benefits within their host State: in general, national rules continue to determine the acquisition and extent of such rights. The regulations simply ensure that persons within their scope both benefit from the principles of aggregation and export of benefits and are protected from any adverse consequence should they move

within the Community or should their situation otherwise involve a cross-border element. The regulations thus merely coordinate national provisions without either creating any Community rights to social security benefits or interfering in Member State competence in the field.

62. Recourse to Article 235 is not necessary, and will in any event not assist in legalising the inclusion of refugees and stateless persons in the personal scope of Regulation No 1408/71. That article was one of the express legal bases of Regulation No 1390/81,[65] which extended the personal scope of Regulation No 1408/71 to self-employed persons and members of their families. It cannot be regarded as a legal basis for other aspects of Regulation No 1408/71 which both pre-date and go beyond the scope of that extension.[66]

Analysis of the second question

63. In its second question the referring court asks essentially whether the Regulation can apply in the circumstances of the cases before it, given that the applicants have not moved within the Community.

64. It will be recalled that in all the cases the applicant and his or her spouse entered Germany from a third country. In no case has the applicant or his or her spouse or children moved from Germany into another Member State. During the period in issue, Mr Khalil was in receipt of unemployment benefit paid in Germany, while Mr Osseili, Mr Nasser, Mr Chaaban and Mr Addou were employed in Germany.

65. In my view, the second question can be answered relatively simply and (as suggested by the Swedish Government, the United Kingdom and the Commission) in the negative. It is clear from the Court's case-law that the regulations implementing the Treaty provisions on free movement of workers do not apply in cases where all the facts are confined to the territory of a single Member State[67] or — to put it differently — which have no factor linking them

65 — Cited in note 7.

66 — See Case C-20/96 *Snares* v *Adjudication Officer* [1997] ECR I-6057, paragraph 71 of the Opinion of Advocate General Léger, and *Kulzer*, cited in note 60, paragraph 36 of the Opinion of Advocate General Fennelly.

67 — Case C-153/91 *Petit* v *Office National des Pensions* [1992] ECR I-4973, paragraph 8 of the judgment, and the cases there cited.

with any of the situations governed by Community law. [68] As the United Kingdom correctly points out, it is settled law that the requisite cross-border element is not supplied by the mere fact that persons who are nationals of third countries are involved; [69] I cannot see that that is different where refugees or stateless persons are involved.

66. At the hearing, the representative of the Spanish Government submitted that a cross-border nexus was no longer required following the Court's decision in *Kulzer*. [70] In my view, that is an incorrect reading of the case. Mr Kulzer was a German national residing in Germany; he had worked in Germany all his working life and was in receipt of a German pension. His daughter had moved from Germany to France where she lived with her mother, from whom Mr Kulzer was divorced. Mr Kulzer's application for child allowance in respect of his daughter was refused on the basis that she was not resident in Germany. The Court, noting in particular the fifth recital in the preamble to Regulation No 1408/71, which states that the Regulation also applies to circumstances where members of the worker's family move within the Community, ruled that Mr Kulzer was covered by the Regulation where his dependent child had moved within the Community with his former spouse. [71]

67. Advocate General Fennelly expressed the same point in his Opinion when he stated:

'In *Entr'aide Médicale* v *Assurances Générales*, the Court articulated a test in respect of Regulation No 3 which, with minor amendments, still determines the personal scope of the Regulation: it was "applicable to any wage-earner or assimilated worker who finds himself in one of the situations involving international elements as provided for in the said regulation, as well as to his survivors". [72]'

68. He concluded that 'a person claiming social security benefits can, in principle, come within the personal scope of application of the Regulation, even if he has never lived nor worked in a Member State other than his own, where all the material facts are not confined to the territory of that Member State, as, for example, when a family member in respect of whom benefits are claimed resides in another Member State.' [73]

68 — Joined Cases 35/82 and 36/82 *Morson and Jhanjan* v *State of the Netherlands* [1982] ECR 3723, paragraph 16 of the judgment.

69 — See *Morson and Jhanjan*, cited in note 68, and Joined Cases C-64/96 and C-65/96 *Uecker and Jacquet* [1997] ECR I-3171.

70 — Cited in note 60.

71 — See paragraphs 30 and 31 of the judgment.

72 — Case 27/69, cited in note 52, paragraph 4 of the judgment.

73 — Paragraphs 35 and 37 of the Opinion.

69. It seems clear therefore that *Kulzer* has not affected the settled case-law requiring a cross-border element for the application of the social security regulations, and I accordingly conclude that Regulation No 1408/71 cannot apply where a worker who is a refugee or stateless person and members of his family have travelled directly to a Member State from a third country and have not moved within the Community and there is no other relevant link with another Member State.

The third question (in *Chaaban* and *Addou*)

70. By its third question, put only in *Chaaban* and *Addou*, the Bundessozialgericht asks whether a family benefit is payable where one spouse is a national of a non-member State and an employed person and the other is a stateless person and not an employed person or where one spouse is a refugee and an employed person and the other is not a national of a Member State or an employed person or a recognised refugee.

71. Those questions arise only if the answer to the second question is affirmative. Since in my view the answer to the second question is manifestly negative, I do not propose to answer the third question.

The question that was not referred in *Addou*

72. Finally I should mention the possible application to Mrs Addou's case of the Cooperation Agreement between the European Economic Community and the Kingdom of Morocco, applicable for the period at issue. [74]

73. The Bundessozialgericht notes in the order for reference that, under Article 41(1) of that Agreement, workers of Moroccan nationality and any members of their family living with them must, subject to the provisions of the subsequent paragraphs, enjoy, in the field of social security, treatment free from any discrimination based on nationality in relation to nationals of the Member States in which they are employed. Article 41(3) provides that such

74 — Signed at Rabat on 27 April 1976 and approved in the name of the Community by Council Regulation (EEC) No 2211/78 of 26 September 1978, OJ 1978 L 264, p. 1.

workers are also to receive family allowances for members of their families who are resident in the Community. The Bundessozialgericht adds that the Court of Justice has ruled that the rules under the Cooperation Agreement for securing equal treatment are directly applicable law and thus do not require any further legal measure, such as decisions by the Cooperation Council. [75]

74. The Bundessozialgericht states that it is also not in any doubt that child-raising allowance is a 'family allowance' within the meaning of Article 41(3) and that it is also immaterial that the claim to child-raising allowance is not made by the employed person himself but by his non-working spouse in her capacity as a family member. [76] Since, under Article 41 of the Agreement, only the worker himself need have Moroccan nationality, but not his family member, the fact that the applicant is herself an Algerian national does not constitute a bar to her claim to child-raising allowance.

75. The Bundessozialgericht considers, however, that the Agreement cannot apply to those persons who come to Germany, not as workers, but as refugees. Article 1 of the Agreement sets out its object as being to promote overall cooperation between the Contracting Parties with a view to contributing to the economic and social development of Morocco and helping to strengthen relations. On any objective assessment of Morocco's situation when concluding the Agreement, there could not logically have been any need at that time to resolve the question of what social rights were to be granted to persons who came from Morocco to Europe, not as workers, but as refugees. The Bundessozialgericht was of the view that that provision was *acte clair* and accordingly expressly refrained from requesting the Court to rule also on that point.

76. The Commission in its written observations considers that that decision was regrettable, since in its view it was not absolutely certain that the Cooperation Agreement was not applicable to refugees having Moroccan nationality.

77. I am inclined to agree with the Commission, since I do not share the Bundessozialgericht's confidence that the matter is *acte clair*. Since however that court decided not to ask for a ruling from the Court on the issue, I do not consider that the Court can answer it.

75 — Case C-18/90 *Kziber* [1991] ECR I-199, Case C-58/93 *Yousfi* [1994] ECR I-1353 and Case C-126/95 *Hallouzi-Choho* v *Bestuur van de Sociale Verzekeringsbank* [1996] ECR I-4807.

76 — See *Hoever and Zachow*, cited in note 11, on a claim to child-raising allowance under Article 73 of Regulation No 1408/71.

Conclusion

78. Accordingly in my opinion the first and second questions referred by the Bundessozialgericht should be answered as follows:

(1) 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 applies to refugees and stateless persons residing within the territory of one of the Member States and to members of their families who are nationals of a non-member State even though such persons have no right of free movement under the Treaty.

(2) Regulation No 1408/71 does not apply where a worker who is a refugee or stateless person and members of his family have travelled directly to a Member State from a non-member State and have not moved within the Community and there is no other relevant link with another Member State.