OPINION OF ADVOCATE GENERAL JACOBS
delivered on 16 July 1998 *

1. The issue in the present case, which comes by way of a reference for a preliminary ruling from the Landessozialgericht Niedersachsen (Higher Social Court, Lower Saxony), is whether a Spanish national residing in Germany with her spouse, also a Spanish national, is entitled to receive German family benefits on the same basis as nationals in circumstances where her spouse, an employee of the Spanish Consulate-General in Hanover, has exercised the right of option, pursuant to Article 16(2) of Regulation (EEC) No 1408/71, [1] to be subject to the Spanish social security scheme.

The relevant Community legislation

2. Article 1(u)(i) of Regulation No 1408/71 in the version in force at the relevant time [2] defines 'family benefit' as:

'all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h), excluding the special childbirth allowances mentioned in Annex II'. [3]

3. Article 2(1) provides:

'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.'

* Original language: English.

1 — 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. For the most recent version see the amended and updated version established by Council Regulation (EC) No 118/97 of 2 December 1996, OJ 1997 L 28, p. 1.

2 — Article 1(u)(i) was amended by Council Regulation (EC) No 3096/95 of 22 December 1995 so as to assimilate adoption allowances to childbirth allowances, OJ 1995 L 335, p. 10.

3 — There is no such allowance mentioned in Annex II in respect of Germany.

4. 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.'

5. Article 4(1) provides:

'This regulation shall apply to all legislation concerning the following branches of social security:

...

(h) family benefits.'

6. Under Title II, headed 'Determination of the legislation applicable', Article 13(1) provides:

'Subject to Article 14(c), persons to whom this Regulation applies shall be subject to the legislation of a single Member State only. That legislation shall be determined in accordance with the provisions of this title.'

7. Article 13(2) provides:

'Subject to Articles 14 to 17:

(a) a person employed in the territory of one Member State shall be subject to the legislation of that State even if he resides in the territory of another Member State or if the registered office or place of business of the undertaking or individual employing him is situated in the territory of another Member State; ...'

8. Article 16 provides:

'(1) The provisions of Article 13(2)(a) shall apply to persons employed by diplomatic missions and consular posts and to the

private domestic staff of agents of such missions or posts.

(2) However, employed persons covered by paragraph 1 who are nationals of the Member State which is the accrediting or sending State may opt to be subject to the legislation of that State. Such right of option may be renewed at the end of each calendar year and shall not have retrospective effect.'

The facts and questions

9. Mrs Gomez Rivero, the plaintiff in the main proceedings, and her husband are Spanish nationals residing in Germany, Mrs Gomez Rivero since 1968, her husband since 1966. They have two children born in 1977 and 1982.

10. Mrs Gomez Rivero is not gainfully employed, with the exception of what the order for reference describes as minor activity as a home help — apparently for about five to six hours per week — since 1994. She is not subject to compulsory social security insurance on the grounds of such employment. Since 1968 her husband has been employed by the Spanish Consulate General in Hanover.

11. Mrs Gomez Rivero's husband has opted to be subject to the Spanish social security legislation pursuant to Article 16(2) of Regulation No 1408/71. Mrs Gomez Rivero has not exercised, or purported to exercise, any such option.

12. In the present proceedings Mrs Gomez Rivero contests the decision taken by the Bundesanstalt für Arbeit (Federal Labour Office), Nuremberg, the defendant in the main proceedings, to withdraw, with effect from 1 February 1995, the family benefits which had previously been paid in respect of her two sons. [4] The decision was based on the option exercised by her husband.

13. Under the Spanish social security scheme Mrs Gomez Rivero does not fulfil the conditions of entitlement to family benefits because her family income exceeds the limit below which such benefits are payable.

14. In the order for reference the referring court finds that under German law Mrs Gomez Rivero continues to fulfil all the conditions to receive the family benefits she claims and is entitled to receive those benefits. It considers, however, that the

4 — Under German law Mrs Gomez Rivero's claim until 31 December 1995 falls to be assessed in accordance with the provisions of the Bundeskindergeldgesetz (Federal Law on Child Allowance) in the version promulgated on 31 January 1994 (BGBl. I, p. 168, 701) and thereafter under the provisions in force from 1 January 1996 of Paragraph 62 et seq. of the Einkommenssteuergesetz (Law on Income Tax) as amended by the Law of 11 October 1995 (BGBl. I, p. 1250).

issue is whether German law on child allowance is applicable to Mrs Gomez Rivero. The referring court has concluded that the benefit in question is a family benefit within the material scope of Regulation No 1408/71 and that Mrs Gomez Rivero is within the personal scope of that regulation. However, it questions whether the option exercised by her husband to be subject to Spanish social security legislation has the effect of making her also subject to Spanish social security legislation so that she would not be entitled to social security benefits under the German scheme. In particular the referring court questions whether the option could have such legal effect for the spouse of an employed person where that spouse, as in the case of Mrs Gomez Rivero, has neither consented to the exercise of the option, nor sought to exercise the option herself.

15. The referring court considers that if the exercise of the option by the spouse of Mrs Gomez Rivero does have the effect of rendering her subject to Spanish social security legislation, irrespective of whether she has given her consent to the option or made such an option herself, then the decision to withdraw German family benefits will be lawful because she is not subject to the German social security scheme. If, on the other hand, the option does not have that effect for Mrs Gomez Rivero, then the referring court concludes that she is entitled to the German family benefits in question, by virtue of Regulation No 1408/71.

16. Against that background the referring court has referred the following questions to this Court:

'(a) Does the option by a person employed in a consular post under the first sentence of Article 16(2) of Regulation No 1408/71 to be subject to the legislation of the sending Member State of which he is a national also have effect for his spouse, not employed by the consular service, who is also a national of the sending Member State,

or

is the legislation of the sending Member State applicable to the spouse only if the spouse also opts to be subject to it?

(b) If the option by the national who is in the consular service also has effect for his spouse, does the effectiveness of the option to be subject to the legislation of the sending Member State presuppose the consent or other cooperation of the spouse who is also affected thereby?'

Observations

17. Written observations have been submitted by Mrs Gomez Rivero, the Finnish Government and the Commission.

18. Mrs Gomez Rivero disputes the relevance of Regulation No 1408/71 to the determination of her entitlement to the family benefit in question. She submits that, whether or not she is bound by the decision of her husband, the option exercised by her husband to be subject to Spanish social security legislation cannot have the effect of disentitling her, or her husband, to German family benefits. She submits that the provisions of Title II of the regulation, headed 'Determination of the legislation applicable', under which the right of a person working in a consular post to opt to be subject to the social security legislation of the sending State falls, are concerned only with determining the legislation applicable in cases where a worker could be subject to a number of different national social security schemes, and do not affect the law relating to the grant of benefits. Since the regulation simply coordinates the social security rules of the Member States, it cannot operate so as to exclude national provisions which are more generous than those of Community law. Mrs Gomez Rivero also argues that the regulation does not apply in the absence of an extraneous element, and that in her case all decisive elements, namely her residence, that of her husband, and of her children, are situated in Germany.

19. The Finnish Government submits that whenever a person could be subject to the social security legislation of more than one Member State the provisions of Title II of Regulation No 1408/71 determine which legislation is applicable. By virtue of Article 2 of the regulation it also applies to members of the worker's family. The Finnish Government observes that the provisions under Title II do not include distinct rules to be applied to the members of the worker's family when determining which legislation they are subject to. It considers that under the system of the regulation the legislation applicable to the members of a worker's family is determined by reference to the legislation applicable to the worker himself. That will also be the case where the worker has exercised the option under Article 16(2); in such a case the members of the worker's family do not have an autonomous right to determine which legislation they are subject to. The Finnish Government concludes that the decision of the worker to opt for the application of the social security legislation of one Member State takes effect for the members of his family. Furthermore, the text of the provision does not allow for the interpretation that such a conclusion depends on the prior consent to the option being given by those family members.

20. The Commission's analysis accords with that of the referring court that if Mrs Gomez Rivero is bound by the option exercised by her husband to be subject to the social security scheme of Spain, then the decision to cease paying family benefit to her with effect from 1 February 1995 is correct. If, however, the exercise of the option is not binding on her then in accordance with Article 13(2)(a) of the

regulation the German social security scheme would apply to her, and, since she fulfils all the conditions for entitlement to that benefit under the relevant German law, the decision to stop the payments would be unlawful.

21. The Commission considers that the questions must be answered in the light of the judgments of this Court in the cases of *Cabanis-Issarte* and *Hoever and Zachow*. [5] The Commission submits that the provisions must be interpreted, in accordance with that jurisprudence, according to whether they confer personal rights on the members of the worker's family or whether they must be interpreted as applying only to the worker himself. The Commission is of the view that Article 16(2) of Regulation No 1408/71 is a provision which can apply only to the worker himself. It considers that an employee of a consulate has a right of option under that provision which is granted to him by his status as such. The Commission concludes that the family members of such a worker, not having such status, do not enjoy the right of option. Further, the Commission concludes that the exercise of that option by the worker cannot have legal repercussions for the members of his family, who, in this case, are therefore subject to German social security legislation.

5 — Case C-308/93 *Bestuur van de Sociale Verzekeringsbank* v *Cabanis-Issarte* [1996] ECR I-2097; Joined Cases C-245/94 and C-312/94 *Hoever and Zachow* v *Land Nordrhein-Westfalen* [1996] ECR I-4895.

Assessment

22. I agree with the Finnish Government's submission that, in cases such as the present, members of a worker's family are subject to the legislation to which the worker himself is subject. That principle also applies where a worker has made use of the right of option provided by Article 16(2) of Regulation No 1408/71. In my view those findings clearly follow from the scheme and provisions of the regulation.

23. In order to facilitate the free movement of workers, Article 51 of the Treaty, pursuant to which Regulation No 1408/71 was enacted, provides the legal basis for Community legislation in the field of social security to ensure that migrant workers and their dependants should not lose benefits acquired in one Member State upon exercising their right to free movement. The regulation has as its aim the coordination of the Member States' provisions in the field of social security to secure the objectives set out in Article 51. Those objectives are, first, to ensure that claimants' contributions in the different Member States are aggregated; and, secondly, to ensure that persons entitled to benefits may collect them wherever they are resident in the Community. The system is designed to abolish as far as possible territorial limitations in the application of different social security schemes within the Community. [6]

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

24. Regulation No 1408/71 serves to coordinate the provisions of national social security schemes *inter alia* by determining which social security scheme applies in the case of a worker and his dependants who have exercised their right to free movement. Those provisions are contained within Title II of the regulation, which is headed 'Determination of the legislation applicable'.

25. The Court has ruled on a number of occasions that the provisions of Title II constitute a complete and uniform system of conflict rules the aim of which is to ensure that workers moving within the Community shall be subject to the social security scheme of only one Member State, in order to prevent the system of legislation of more than one Member State from being applicable and to avoid the complications which may result from that situation. [7] It should be noted, however, that the regulation goes no further than coordinating national provisions. It does not, for example, lay down conditions creating the right or the obligation to become affiliated to a social security scheme. [8]

26. I am unable to accept the Commission's suggestion that the spouse of an employed person could, although not independently insured, be subject, by virtue of the provisions of Regulation No 1408/71, to the social security scheme of a Member State different from that to which the employed person is subject.

27. Article 13(2)(a), on which the Commission relies, refers to the employed person, not to the spouse. Moreover under the scheme of the regulation it is clear that, in the absence of specific provisions to the contrary, the members of a worker's family are subject to the same legislation as the worker. That is entirely logical, since the rights of members of the family arise, in the scheme of the regulation, from the status of the worker as an insured person. The position may of course be different if a member of a family is an employed person, within the meaning of Article 2(1), in his own right.

28. Nor do I accept the Commission's suggestion that the principles developed by the Court on the distinction between rights in person and derived rights are relevant for determining the applicable legislation. It seems to me that the Commission confuses the determination of the applicable legislation with the determination of rights accruing to the members of a worker's family under that legislation. The Court's judgments in *Cabanis-Issarte* and *Hoever and Zachow* [9] concern the latter issue only. In issue in *Cabanis-Issarte* were the pension rights of the widow of a French worker who had spent part of his career in the Netherlands. The applicable legislation was the Netherlands' legislation and the question was whether Mrs Cabanis-Issarte could claim rights in person under that legislation, a question to which the Court gave an affirmative reply. *Hoever and Zachow* concerned the right to child-raising allowance accruing to the wives of German workers in a situation in which the workers were employed in Germany but

7 — See, for example, Case C-131/95 *Huijbrechts* v *Commissie voor de Behandeling van Administratieve Geschillen* [1997] ECR I-1409, paragraph 17 of the judgment; Case C-275/96 *Kuusijärvi*, judgment of 11 June 1998, paragraph 28.

8 — Case C-2/89 *Kits van Heijningen* [1990] ECR I-1755, paragraph 19 of the judgment; *Kuusijärvi*, paragraph 29.

9 — Cited in note 5.

residing in the Netherlands. By virtue of that employment the applicable legislation was the German legislation and the question was whether Mrs Hoever and Mrs Zachow, who had no independent employment within the meaning of the regulation, were entitled to the benefit in their own right: a question to which the Court again gave an affirmative reply. While those judgments make it clear that the members of a migrant worker's family are not confined under the regulation to claiming only rights derived from their status of member of the worker's family, they by no means suggest that the distinction between derived rights and rights in person is relevant to determining the applicable legislation. Nor am I able to see how that distinction could be relevant to that determination. Under the system of the regulation it is first necessary to determine the applicable legislation before it becomes possible to establish the actual rights to benefits, and to that end the regulation lays down binding rules on which legislation applies. As there are no such rules specific to the members of a worker's family it follows from the scheme of the regulation that legislation which applies to the migrant worker will also apply to the members of his family. That must also be so in the exceptional case where pursuant to Article 16(2) the migrant worker has a right of option.

29. It is true that in the present case the effect of the regulation is such that Mrs Gomez Rivero is not entitled to the benefits in issue, whereas she would have been entitled to them in the absence of the regulation. That result however is the consequence of the function of Title II of the regulation which is to lay down a complete system of conflict rules. Moreover, as the Court has recognised, that result is not contrary to the principle established in the Court's case-law to the effect that the application of the regulation cannot entail the loss of rights acquired exclusively under national legislation. The Court has held that that principle does not apply to the rules for determining the legislation applicable. [10]

30. In my opinion, therefore, the answer to the referring court's first question is that where a person employed in a consular post exercises the option, under the first sentence of Article 16(2) of Regulation No 1408/71, to be subject to the legislation of the sending Member State of which he is a national, that has effect also for his spouse, not employed in the consular service, who is also a national of the sending Member State.

31. By its second question, the referring court asks whether, if the option to be subject to the legislation of the sending State has effect also for the spouse, the effectiveness of the option presupposes the consent or other cooperation of the spouse who is affected thereby.

32. In my view, there is nothing in the wording of Article 16(2) of the regulation

10 — See Case 302/84 *Ten Holder* v *Nieuwe Algemene Bedrijfsvereniging* [1986] ECR 1821, paragraph 22 of the judgment.

to suggest that in order for the option to take effect, the spouse of the employed person must consent to the option being exercised. To read into that provision the necessity of obtaining the consent of the spouse (or, for that matter, any other adult dependant of the worker's family) would lead to legal uncertainty and could render the provision unworkable, thereby depriving it of any useful effect. I would also note that the members of the family of a migrant worker who has the right of option under Article 16(2) are no worse off than family members of a migrant worker who does not have such a right of option: in the latter case the family members are in any event bound by the provisions laying down the applicable legislation.

33. Finally I should note that the Commission addressed argument to the possible application of Regulation (EEC) No 1612/68. [11] Article 7 of that regulation provides:

'(1) A worker who is a national of a Member State may not, in the territory of another Member State, be treated differently from national workers by reason of his nationality in respect of any conditions of employment and work...

(2) He shall enjoy the same social and tax advantages as national workers.'

34. The Commission suggests that, in view of Mrs Gomez Rivero's occupation for five to six hours per week, she may come within the definition of a worker within the meaning of that regulation and would thus be entitled to claim social advantages, pursuant to Article 7(2) of the regulation, on the same basis as German nationals. The Commission considers, however, that it does not have sufficient knowledge of the facts in order to express a view on that issue, which must therefore be left to the referring court to decide in the light of the Court's case-law on the definition of a worker. [12]

35. It seems to me, however, inappropriate to examine the potential application of Regulation No 1612/68, for the following reasons. The questions referred to the Court do not mention that regulation, nor does the order for reference. As a result the parties to the main proceedings and the Member States have not had the opportunity to discuss before the Court the scope of the regulation. Perhaps those objections could be set aside in a case where the regulation was plainly relevant and was inadvertently overlooked. However, that is not the case here. It is not at all clear in the present case whether Mrs Gomez Rivero is a worker under the regulation, or whether the non-discrimination rule of the regula-

11 — Council Regulation (EEC) No 1612/68 of 15 October 1968 on freedom of movement for workers within the Community, OJ, English Special Edition 1968 (II), p. 465.

12 — As regards the definition of a worker within the meaning of Regulation No 1612/68 see, for example, Case 139/85 *Kempf* v *Staatssecretaris van Justitie* [1986] ECR 1741; Case C-27/91 *Le Manoir* [1991] ECR I-5531.

tion has the effect of overriding the provisions of Regulation No 1408/71 on the determination of the applicable social security legislation. Those are important issues which cannot be addressed in the absence of express argument.

Conclusion

36. For the reasons given above, I am of the opinion that the questions referred by the Landessozialgericht Niedersachsen should be answered as follows:

(1) Article 16(2) of Regulation (EEC) No 1408/71 must be interpreted as meaning that where a person employed in a consular post exercises the option, under the first sentence of Article 16(2) of Regulation No 1408/71, to be subject to the legislation of the sending Member State of which he is a national, that has effect also for his spouse, not employed in the consular service, who is also a national of the sending Member State.

(2) The effectiveness of the option does not depend upon the prior consent or other cooperation of the spouse.