OPINION OF MR ADVOCATE GENERAL JACOBS
delivered on 17 October 1989 *

My Lords,

1. These cases come before the Court by way of references for preliminary rulings by, in Case C-228/88, the Bayerisches Landessozialgericht (Higher Social Court of Bavaria), and, in Case C-12/89, the Bundessozialgericht (Federal Social Court), Federal Republic of Germany. Although the facts of the two cases are slightly different, they raise essentially the same issue and for this reason the Court decided that they should both be heard on the same day. The cases are regarded as being of considerable importance by the German Government and the answers the Court gives to the questions submitted will affect a number of similar cases. Some of these are already pending before the Court.

2. The question raised by both cases is in essence whether a migrant worker is entitled to receive family benefits from the host State in respect of an unemployed child resident in the worker's country of origin, when the first State makes entitlement to benefit conditional on prior registration with that State's employment services and the child in question is in fact registered with the employment services of the second State.

3. Case C-228/88 arises in the following way. Mr Bronzino, an Italian national, has been employed for several years in Augsburg, Federal Republic of Germany. His wife and seven children reside at Ercolano in the province of Naples (Italy). He has received family allowances from the Kindergeldkasse (Child Benefit Fund) since January 1985 in respect of four of his children. In March 1985, he applied for family allowances in respect of his three other children, who were born in 1964, 1966 and 1967 respectively. He produced various certificates from the Ercolano Employment Office showing that these three children were registered there as trainees or workers seeking employment, i. e. unemployed.

4. Mr Bronzino's claim was rejected on 11 April 1985. On 21 August 1986, the Sozialgericht (Social Court), Augsburg, upheld Mr Bronzino's application and ordered the defendant to pay him the family allowances he was claiming. The defendant appealed to the Bayerisches Landessozialgericht, which stayed the proceedings and asked this Court for a preliminary ruling on the following question:

'Are Articles 73(1) and 3(1) of Regulation (EEC) No 1408/71 or other provisions of Community law to be interpreted as meaning that a migrant worker is entitled to family benefits in the State of employment even when the family member is only

* Original language: English.

registered as unemployed and available for work in the State of residence and under that State's rules and cannot begin or continue vocational training there because of a lack of places in training schemes, but the national law of the State of employment demands that these preconditions be fulfilled in its territory?'

5. In Case C-12/89, the facts are similar. Mr Gatto is an Italian national who is resident in the Federal Republic of Germany. Unlike Mr Bronzino, however, he is unemployed and since 1976 has been in receipt of unemployment benefits or assistance. His wife and three children live in Italy. His daughter Antonia, who was born in 1968, is unemployed and his two younger children are still at school. On 6 May 1985, Mr Gatto applied to the defendant for German family allowances in respect of Antonia. In support of his claim he produced a certificate from the responsible Italian employment office to the effect that Antonia was unemployed. Mr Gatto's application was rejected and an action brought by Mr Gatto against the defendant's decision before the Sozialgericht was unsuccessful. An appeal by Mr Gatto to the competent Landessozialgericht (Higher Social Court) was also dismissed. Mr Gatto brought a further appeal before the Bundessozialgericht, which decided to refer the following question to this Court:

'Does Article 74(1) of Regulation (EEC) No 1408/71, in addition to laying down a rule of notional residence, also have as a result that the requirement under the law of the country in which the worker was (last) employed that, for the purpose of family benefits, a member of the family be unemployed is to be regarded as fulfilled if the member of the family is at the disposal of the employment office in the country in which he resides?'

The national legislation

6. The German authorities' refusal to award Mr Bronzino and Mr Gatto the benefits claimed was based essentially on Paragraph 2(4) of the Bundeskindergeldgesetz (Federal Law on Family Allowances for Dependent Children) (BKGG), the relevant part of which provides as follows:

'Children who are aged over 16 but under 21 shall also be taken into consideration where, within the territory covered by the law,

(1) they cannot begin or pursue vocational training in the absence of vacancies, or

(2) they are at the disposal of the employment office as unemployed persons . . . '

Thus, benefit is only payable in respect of unemployed children between the ages of 16 and 21 if they are resident in the national territory to which the BKGG applies and have either been unable to secure a place on a course of vocational training or are at the disposal of the Federal Employment Office. The issue which this Court is called upon to decide is whether registration with the employment authorities of another Member State must be treated as equivalent to registration with the employment authorities of the Federal Republic in the case of the children of a person who falls within the scope *ratione personae* of Regulation No 1408/71.

Community legislation

7. Council Regulation (EEC) No 1408/71 of 14 June 1971, as amended, is concerned with the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community. The most recent consolidated version appears in Official Journal 1983, L 230, p. 6 *et seq.* Articles 73(1) and 74(1) of that regulation provide as follows:

Article 73(1): 'An employed person subject to the legislation of a Member State other than France shall be entitled to the family benefits provided by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State.'

Article 74(1): 'An unemployed person who was formerly employed and who draws unemployment benefits under the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State as though they were residing in the territory of the first State.'

It should be noted in passing that in the judgment of 2 March 1989 in Case 359/87 *Pinna* v *Caisse d'allocations familiales de la Savoie* [1989] ECR 585, the Court said that the phrase 'other than France' in Article 73(1) was to be treated as having implicitly been declared invalid by its previous ruling in Case 41/84, which involved the same parties (see [1986] ECR 1). The same is in my view also true of the equivalent words in Article 74(1).

8. 'Family benefits' are defined in Article 1(u)(i) of the regulation as 'all benefits in kind or in cash intended to meet family expenses under the legislation provided for in Article 4(1)(h) . . .'. Article 4(1) specifies the branches of social security which fall within the scope of the regulation. Paragraph (h) of Article 4(1) simply says 'family benefits'.

9. Finally, Article 3(1) of the regulation 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.'

The questions referred

10. The questions referred raise essentially three issues. The first two are whether the benefit claimed by Mr Bronzino and Mr Gatto constitutes a family benefit within the meaning of Articles 73 and 74 respectively of the regulation and, if so, whether the conditions of entitlement laid down in those articles are satisfied. The answer to these questions may be affected by the third issue raised, which is whether the refusal of the German authorities to award benefits to Mr Bronzino and

Mr Gatto is contrary to the rule against discrimination on the grounds of nationality laid down in Article 3(1) of Regulation No 1408/71, which is a specific expression of the more general rule laid down in Articles 7 and 48(2) of the Treaty.

11. The German Government, supported in Case C-228/88 by the Dutch Government, claims that these questions should in effect be answered in the negative. It argues that the benefit claimed by the applicants is in substance a measure for the promotion of employment which is applicable, irrespective of any question of free movement between Member States, to everyone in the relevant age-group. Although the measure is classified under the relevant German legislation as a family benefit, this is due solely, so it claims, to administrative convenience. The reason why Paragraph 2(4) of the BKGG requires the presence in the Federal Republic of children in respect of whom benefit is claimed is that it is only then that the German authorities are in a position to find them jobs or places on training schemes. Thus, the link between the award of benefit and presence on the national territory is justified by the legislature's objective of promoting employment.

12. The Commission, along with Mr Bronzino and the Italian and Portuguese Governments in Case C-228/88 and the Belgian and Italian Governments in Case C-12/89, takes the opposite view. According to the Commission, the object of both Articles 73 and 74 of Regulation No 1408/71 is to protect workers and the members of their families from the deleterious effects which might otherwise flow from the exercise of their right to freedom of movement between Member States. A requirement that a person seeking work must register with a German employment agency before entitlement to family benefits arises in respect of that person amounts to precisely the type of obstacle which Articles 73 and 74 were designed to remove. Such an obstacle will only disappear, according to the Commission, if registration in another Member State is treated as equivalent to registration in the State where benefit is being claimed.

13. In my view, the benefits claimed by Mr Bronzino and Mr Gatto clearly constitute 'family benefits' for the purposes of Articles 73 and 74 of the regulation. It will be observed at the outset that they are categorized in similar terms not only by the German legislature but also by the referring courts. Moreover, in the declaration made by the German Government under Article 5 of the regulation, which requires Member States to specify *inter alia* the legislation and schemes referred to in Article 4(1), express mention is made of the law under which those benefits are claimed (see Official Journal 1980, C 139, p. 6, item 5).

14. In any event, I consider that the definition of 'family benefits' in Article 1(u)(i) of the regulation is apt to cover the benefits in issue, which can properly be regarded as 'intended to meet family expenses'. As the German Government itself accepts in its observations, young unemployed people who have not yet acquired the right to unemployment benefit generally live at home with, and at the expense of, their parents. It is pertinent to note in this respect that it is to the parents, and not to the child, that benefit under the BKGG is paid. Both

the nature of the benefit and the way in which it is paid confirm that it is intended to meet the expenses incurred by parents in respect of their unemployed children. The benefit thus falls squarely within the definition of 'family benefits' in Article 1(u)(i).

15. The German Government relies on a number of decisions of the Court as showing that the Court categorizes benefits according to their objectives rather than their formal classification. It cites in this regard Case 94/84 *Office national de l'emploi* v *Deak* [1985] ECR 1873, Case 378/85 *Campana* v *Bundesanstalt für Arbeit* [1987] ECR 2387 and Case 313/86 *Lenoir* v *Caisse d'allocations familiales des Alpes-Maritimes* [1988] ECR 5391 (judgment of 27 September 1988). Whilst I accept that the Court is not bound by the formal classification accorded to a benefit under national law, I do not think that those cases lend any further support to the argument of the German Government.

16. The *Deak* case concerned a claim for a special unemployment benefit for young workers provided under Belgian legislation brought by a Hungarian national living in Belgium with his mother, an Italian national who had a job there. The applicant's claim was rejected by the competent Belgian institution because of his Hungarian nationality. The claimant contended that he was entitled to the benefit sought under Regulation No 1408/71 as a member of the family of a worker who was a national of another Member State. The Court held, however, applying the principle laid down in Case 40/76 *Kermaschek* v *Bundesanstalt für Arbeit* [1976] ECR 1669, that a person in the situation of the claimant could not rely on Regulation No 1408/71. This was because the members of a migrant worker's family were only entitled under that regulation to the benefits provided under national law by virtue of their status as members of the family, while the special unemployment benefit at issue was available to young people seeking work not because they were members of a worker's family but on the basis of their own personal situation. In the present cases, however, the rights at issue are those of Mr Bronzino and Mr Gatto, not those of their children, so that these considerations do not arise.

17. The *Campana* case provides another example of the Court's readiness to examine the substance of a benefit in deciding how it should be classified for the purposes of Regulation No 1408/71. In that case, the Court was asked whether a national benefit designed to prevent *future* unemployment rather than to alleviate the effects of *present* unemployment constituted an unemployment benefit within the meaning of Articles 67(1) and 4(1)(g) of the regulation. The Court said that it would be contrary to the aim of Article 51 of the Treaty to exclude from the scope of those provisions all benefits intended to prevent future unemployment. However, where, as in the case before the referring court, the benefit took the form of assistance with vocational training, it would only constitute an unemployment benefit for the purposes of the regulation in cases involving those who were already unemployed or actually threatened with unemployment.

18. I do not consider that the *Campana* case offers any assistance in determining whether the benefits at issue in the present cases

constitute family benefits for the purposes of Articles 73 and 74 of the regulation beyond indicating that the answer to that question depends on their substance rather than their form, a proposition which I do not in any event dispute.

19. I turn now to the *Lenoir* case, which I have two reasons for believing is distinguishable from the present cases, one technical, the other substantive. First, the *Lenoir* case turned on the special definition of benefits in Article 77(1) of the regulation, which the Court said corresponded to the definition of 'family allowances' laid down in Article 1(u)(ii) of the regulation. It is, of course, Article 1(u)(i) which is at issue here. Perhaps more fundamentally, however, the Court in *Lenoir* drew a distinction between cash benefits granted exclusively by reference to the number or age of members of the family and other benefits, such as a benefit designed to cover expenses associated with the start of the school year. While payment of the former remained justified wherever the recipient and his family lived, the latter was closely linked to the social setting and therefore to the place of residence of those affected. It was therefore compatible with Article 77 for the competent State to refuse to pay the latter type of benefit to a claimant who had moved with his family to another Member State.

20. In my view, the present cases do not concern a benefit designed to meet a need felt only by those whose families are resident in the Federal Republic. When a young person is unemployed, he is likely to be a financial burden on his family regardless of the Member State in which he resides. Although it may well be easier for young people to find work in the Federal Republic than in southern Italy, it would be inconsistent with the proper functioning of the common market for this to be used as a reason for denying benefit to the claimants in cases such as these, for it is one of the objectives of the Treaty to enable workers such as Mr Bronzino and Mr Gatto to take advantage of more favourable conditions prevailing in Member States other than their own.

21. Indeed, the principle of freedom of movement for workers, to which Regulation No 1408/71 is designed to give effect, is one of the foundations of the Community. For this reason, the provisions of the regulation should not be construed strictly but rather given a broad interpretation which is consonant with its underlying aims. To deny claimants such as Mr Bronzino and Mr Gatto benefit in circumstances such as these could act as a considerable disincentive to the exercise of the right to freedom of movement and it seems to me to be against just this sort of disincentive that Articles 73 and 74 of the regulation were intended to guard. The concept of 'notional residence' enshrined in those articles does not in my view therefore simply require Member States to treat members of the migrant worker's family as if they were resident in the host State. It should also be understood as requiring Member States to regard other conditions of eligibility for benefits as satisfied if they are satisfied in the country where the members of the migrant worker's family reside. Otherwise, a Member State could circumvent the rule of

notional residence by laying down conditions of entitlement which can in practice only be satisfied by those who are resident in its own territory. This would be tantamount to introducing a residence requirement by the back door, something it cannot have been the purpose of Articles 73 and 74 to permit.

22. I am reinforced in my view that the benefits claimed by Mr Bronzino and Mr Gatto constitute 'family benefits' within the meaning of Articles 73 and 74 respectively of Regulation No 1408/71 by the fact that a contrary interpretation would result indirectly in discrimination against them on the basis of their nationality. Although Paragraph 2(4) of the BKGG does not expressly make any reference to the nationality of the unemployed person, it lays down a condition which German nationals will find much easier to satisfy than nationals of other Member States. As the Court made clear in the first *Pinna* judgment, already cited, 'the principle of equal treatment prohibits not only overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result' (paragraph 23). Should there have been any doubt that Paragraph 2(4) bears more heavily on the nationals of other Member States than on Germans, the Commission has produced figures supplied by the German authorities which show that, at the end of 1984, more than 17 % of children of nationals of other Member States living in Germany and entitled to German family benefits were living abroad whereas the number of children living abroad of German nationals represented only 0,03 % of the total Member of Germans entitled to family benefits.

23. According to the German Government, indirect or disguised discrimination on grounds of nationality arises exclusively where the rule in question in principle only affects foreigners. The notion of indirect discrimination is by no means as narrow as this, however, and one need look no further than the first *Pinna* judgment to see that the view of the German Government cannot be reconciled with the Court's case-law. That case concerned the entitlement of an employed person subject to French legislation to family allowances in respect of members of his family residing in another Member State. Under Article 73(2) of the regulation in the version in force at the material time, such a person was entitled to the family allowances provided not in France but in the Member State where the family resided. The Court pointed out that 'although as a general rule the French legislation employs the same criterion to determine the entitlement to family benefits of a French worker employed in French territory, that criterion is by no means equally important for that category of worker, since the problem of members of the family residing outside France arises essentially for migrant workers' (paragraph 24). Thus, the fact that a few French nationals might find themselves in the same position as migrant workers resident in France did not prevent Article 73(2) from being indirectly discriminatory given that the majority of those affected by it would be nationals of other Member States.

24. The German Government points out that the Court has refused to lay down a general rule to the effect that facts taking place abroad must be treated as if they have taken place in the competent State. It cites Case 20/75 *D'Amico* [1975] ECR 891 and

Case 266/78 *Brunori* [1979] ECR 2705 in support of this proposition.

25. The claims of Mr Bronzino and Mr Gatto do not, however, depend on the existence of any such general rule. The present cases can in my view only be resolved by reference to the terms of Articles 73 and 74, interpreted in the light of the regulation's objectives. On that basis, the substance of the answers must for the reasons given above be affirmative. As to the terms of the answers, although the questions are formulated differently in the two cases it will be clearer if the answers in both are formulated in similar terms.

26. I am therefore of the opinion that the question referred by the Bayerisches Landessozialgericht in Case C-228/88 should be answered as follows:

'Article 73(1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 must be interpreted as meaning that a migrant worker is entitled to family benefits in the State of employment in respect of family members registered as unemployed and available for work in another Member State, even though the national law of the State of employment demands that those preconditions be fulfilled in its own territory.'

27. The question referred by the Bundessozialgericht in Case C-12/89 should be answered as follows:

'Article 74(1) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 must be interpreted as meaning that an unemployed person is entitled to family benefits in the State in which he was last employed in respect of family members registered as unemployed and available for work in another Member State, even though the national law of the first State demands that those preconditions be fulfilled in its own territory.'