OPINION OF ADVOCATE GENERAL FENNELLY
delivered on 24 October 1996 *

1. This case concerns the interpretation of Articles 77(2)(b) and 78(2)(b) of Council Regulation (EEC) No 1408/71. These articles relate to social security benefits in respect of pensioners' dependent children and of orphans. In each of the individual instances gathered in this case, the social security system of the Member State of residence does not accord as high a benefit as does Germany, or does not do so for as long a period. The Sozialgericht Nürnberg (Social Court, Nuremberg) raises the question whether a benefit supplement (whereby the German authorities would be required to supplement the benefit payable in Spain or Italy to bring it to the level payable in Germany) should be paid where the pension is awarded by Germany only on the basis of aggregation, in accordance with Regulation No 1408/71, of contributions in several Member States, or where the orphan's deceased parent would only have been entitled to a pension on the basis of aggregation. It effectively concerns the scope of the case-law on suppressing obstacles to free movement which arise from the fear of losing social security entitlements and, in particular, the judgment of the Court in *Athanasopoulos and Others*. [1] If this case-law does apply to the present case, the German court asks if the amount of the supplement should be reduced in accordance with the proportion of periods of contribution in Germany to those in the State of residence or in another Member State.

Legal context

Community legislation

2. The second and third recitals in the preamble to 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 [2] (hereinafter 'the Regulation') record as its purpose the implementation of Article 51 of the Treaty establishing the European Community (hereinafter 'the Treaty') on social security benefits for migrant workers by way of coordination, 'taking into account the considerable differences existing between national social security legislation'. At the time of enactment, the seventh recital stated that 'the provisions for coordination adopted for the implementation of Article 51 of the Treaty must guar-

* Original language: English.

1 — Case C-251/89 [1991] ECR I-2797.

2 — OJ, English Special Edition 1971 (II), p. 416. The most recent consolidated version of this much-amended legislation is published in OJ 1992 C 325, p. 1. The Regulation was amended most recently by Council Regulation (EEC) No 1945/93, OJ 1993 L 181, p. 1 and by the most recent Act of Accession, OJ 1994 C 241, p. 1.

antee to workers who move within the Community their accrued rights and advantages whilst not giving rise to unjustified overlapping of benefits'. However, the eighth recital stated that 'it is necessary to limit the [enjoyment of accrued] benefits to the greatest amount which would have been due to a worker from one of these States if he had spent all his working life there'.

3. Article 45(1) of the Regulation states:

'Where the legislation of a Member State makes the acquisition, retention or recovery of the right to benefits, under a scheme which is not a special scheme within the meaning of paragraphs 2 or 3, subject to the completion of periods of insurance or of residence, the competent institution of that Member State shall take account, where necessary, of the periods of insurance or of residence under the legislation of any other Member State, be it under a general scheme or under a special scheme and either as an employed person or a self-employed person. For that purpose, it shall take account of these periods as if they had been completed under its own legislation.'

4. Chapter 8 of Title III of the Regulation concerns 'benefits for dependent children of pensioners and for orphans'. Article 77 states:

'1. The term "benefits", for the purposes of this Article, shall mean family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners, with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases.

2. Benefits shall be granted in accordance with the following rules, irrespective of the Member State in whose territory the pensioner or the children are residing:

(a) to a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension;

(b) to a pensioner who draws pensions under the legislation of more than one Member State:

(i) in accordance with the legislation of whichever of these States he resides in provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State;

or

(ii) in other cases in accordance with the legislation of the Member State to which he has been subject for the longest period of time, provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), a right to one of the benefits referred to in paragraph 1 is acquired under such legislation; if no right to benefit is acquired under that legislation, the conditions for the acquisition of such right under the legislations of the other Member States concerned shall be examined in decreasing order of the length of periods of insurance or residence completed under the legislation of those Member States.'

5. Article 78 of the Regulation states:

'1. The term "benefits", for the purposes of this Article, means family allowances and, where appropriate, supplementary or special allowances for orphans and orphans' pensions except those granted under insurance schemes for accidents at work and occupational diseases.

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

(a) for the orphan of a deceased employed or self-employed person who was subject to the legislation of one Member State only in accordance with the legislation of that State;

(b) for the orphan of a deceased employed or self-employed person who was subject to the legislation of several Member States:

(i) in accordance with the legislation of the Member State in whose territory the orphan resides provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State;

or

(ii) in other cases in accordance with the legislation of the Member State to which the deceased had been subject for the longest period of time, provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), the right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State; if no right is acquired under that legislation, the conditions for the acquisition of such right under the legislations of the other Member States [concerned] shall be examined in decreasing order of the length of periods of insurance or residence completed under the legislation of those Member States.

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

6. Article 79 of the Regulation states, in relevant part:

'1. Benefits, within the meaning of Articles 77 and 78, shall be provided in accordance with the legislation determined by applying the provisions of those Articles by the institution responsible for administering such legislation and at its expense as if the pensioner or the deceased had been subject only to the legislation of the competent State.

However:

(a) if that legislation provides that the acquisition, retention or recovery of the right to benefits shall be dependent on the length of periods of insurance, employment, self-employment or residence such length shall be determined taking into account, where appropriate, the provisions of Article 45 or, as the case may be, Article 72;

(b) if that legislation provides that the amount of benefits shall be calculated on the basis of the amount of the pension, or shall depend on the length of periods of insurance the amount of these benefits shall be calculated on the basis of the theoretical amount determined in accordance with the provisions of Article 46(2).

...

3. The right to benefits due only under the national legislation ... and under Articles 77 and 78 shall be suspended if the children become entitled to family benefits or family allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity. In such a case, the persons concerned shall be considered as members of the family of an employed or self-employed person.'

7. Article 80(1) of the Regulation establishes an Administrative Commission on Social Security for Migrant Workers (hereinafter 'the Administrative Commission') made up of a government representative of each of the Member States. Pursuant to Articles 80(3) and 81(a) of the Regulation, the Administrative Commission may reach decisions, by unanimity, on questions of interpretation arising from the provisions of the Regulation, without prejudice to the right of the authorities, institutions and persons concerned to have recourse to the procedures and tribunals provided for by the legislations of Member States, by the Regulation or by the Treaty.

Case-law

8. The Court has established the principle that Community acts adopted on the basis of Article 51 of the Treaty providing for the acquisition of social security benefits by the aggregation of periods taken into account under the laws of several Member States cannot prejudice the acquisition or retention of social security rights under the law of one Member State alone (referred to, at times, in this Opinion as 'purely national' rights). At different periods and in different fields, this principle has been given effect by the Court either by requiring that Community-coordinated social security benefits be supplemented, to make up the difference between those benefits and purely national benefits, by the Member State responsible for the latter ('the supplement principle'), or by requiring that purely national entitlements be maintained in full alongside those arising by virtue of Community law, even if this results in higher benefits for the migrant worker than would have been obtainable had he remained in one Member State throughout his working life ('the retention principle'). [3] The retention principle was established in respect of pensions in *Petroni* v *ONPTS*, [4] in which the Court ruled that the then Article 46(3) of the Regulation was 'incompatible with Article 51 of the Treaty to the extent to which it imposes a limitation on the overlapping of two benefits acquired in different Member States by a reduction in the amount of a benefit acquired under national legislation alone'. [5]

9. Similar questions regarding limits on the overlapping of equivalent social security benefits arose in the field of family allow-

3 — For a possible explanation of why the retention principle has been applied to pensions and the supplement principle to family benefits, see F. Pennings, *Introduction to European Social Security Law* (Deventer, 1994), p. 233.

4 — Case 24/75 [1975] ECR 1149.

5 — Operative part of the judgment of the Court. The earlier case-law of the Court on pensions, under the preceding Council Regulation (EEC) No 3 concerning social security for migrant workers, JO 1958 30, p. 561, as well as under the Regulation, appears to have oscillated between the two possible solutions just mentioned. See, on the one hand, Case 100/63 *Kalsbeek* v *Sociale Verzekeringsbank* [1964] ECR 565 and Case 4/66 *Labots* v *Raad van Arbeid Arnhem* [1966] ECR 425, and, on the other, Case 1/67 *Ciechelski* v *Sécurité Sociale Orléans* [1967] ECR 181, Case 2/67 *De Moor* v *Caisse de Pension* [1967] ECR 197 and Case 9/67 *Colditz* v *Assurance Vieillesse Paris* [1967] ECR 229. See generally D. Wyatt, 'Pensions and acquired rights under national law' (1975-76) 1 *European Law Review* 314. The Court accepted that the provisions of Article 46(3) on the total permissible amount of aggregated pensions could not apply either in respect of a national pension entitlement supplemented by Community rules suppressing residence requirements. See Article 10 of the Regulation, and Case 32/77 *Giuliani* v *Landesversicherungsanstalt Schwaben* [1977] ECR 1857. A general discussion can be found in S. Van Raepenbusch, *La Sécurité Sociale des Personnes qui Circulent à l'Intérieur de la Communauté Économique Européenne* (Brussels, 1991), pp. 366-369.

ances under Chapter 8 of Title III of the Regulation in *Rossi* v *Caisse de Compensation pour Allocations Familiales.* [6]

Article 79(3) of the Regulation provides for the suspension of benefits payable pursuant to either national law or Articles 77 and 78 where equivalent entitlements arise in another Member State pursuant to the exercise of a professional or trade activity. It appears from the Opinion of Advocate General Capotorti in *Rossi* that the case concerned the overlap between the purely Belgian national right of a pensioner, who had moved to Italy, to receive a dependent child pension supplement and his wife's possible entitlement to a lower Italian allowance on the basis of her employment there. He spoke of the necessity of protecting 'accrued rights' by the application of the supplement principle. [7] The Court stated that Community legislation 'did not set up a common scheme of social security, but allowed different schemes to exist, creating different claims on different institutions against which the claimant possesses direct rights by virtue either of national law alone or of national law supplemented, where necessary, by Community law'. [8] The Court continued, that a Community rule, and Article 79(3) of the Regulation in particular, 'designed to prevent the overlapping of family allowances, is applicable only to the extent to which it does not, without cause, deprive the persons concerned of the benefit of a part of the legislation of a Member State'. Thus, Article 79(3) was applicable 'only to the extent of the amount actually paid by virtue of the pursuit of a professional or trade activity', [9] the difference being paid by the Belgian authorities by way of supplement.

10. In a number of subsequent cases, the Court considered the anti-cumulation provisions of Articles 76 and 79(3) of the Regulation, and their equivalent regarding self-employed persons, Article 10(1) of Council Regulation (EEC) No 574/72 of 21 March 1972 laying down the procedure for implementing Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to their families moving within the Community. [10] In doing so, the Court has applied the supplement principle in cases of the overlap of purely national family allowance entitlements with entitlements arising only through the operation of Community law (for example, by the suppression of residence requirements pursuant to Article 73 of the Regulation), [11] and the retention principle in cases of the overlap of purely national entitlements in different Member States. [12]

6 — Case 100/78 [1979] ECR 831.

7 — Page 851 of his Opinion.

8 — Paragraph 13 of the judgment.

9 — Operative part of the judgment of the Court.

10 — OJ, English Special Edition 1972 (I), p. 159.

11 — See Case 104/80 *Beeck* v *Bundesanstalt für Arbeit* [1981] ECR 503; Case 104/84 *Kromhout* v *Raad van Arbeid* [1985] ECR 2205; Case 153/84 *Ferraioli* v *Deutsche Bundespost* [1986] ECR 1401; Case 24/88 *Georges* v *ONAFTS* [1989] ECR 1905. The supplement principle has been applied consistently irrespective of whether it is the purely national right or the right acquired by virtue of coordination under Community law which is partially suspended. Cf. Van Raepenbusch's analysis, op. cit., pp. 380-390, which focuses on suspension of coordinated rights only and is, thus, unable to accommodate *Kromhout*.

12 — Case 377/85 *Burchell* v *Adjudication Officer* [1987] ECR 3329.

11. The Court has adopted a similar approach to the application of Articles 77 and 78 of the Regulation. These Articles provide that only one Member State should be responsible for the payment of benefits for the dependent children of pensioners or for orphans in any given case: the Member State which is solely responsible for payment of a pension or to whose legislation a deceased worker was exclusively subject, or, where more than one Member State is responsible for payment of pensions or the deceased worker was subject to the legislation of more than one Member State, the Member State of residence or, in the absence of entitlement in that State, the Member State in which the longest period of insurance or residence has been spent and in which such benefits are available. An exception to this principle of exclusive attribution of responsibility was established in *CCAF* v *Laterza*, [13] in which the Court ruled that a pensioner's entitlement to family benefits in respect of dependent children pursuant to Article 77(2)(b)(i) of the Regulation from the State in whose territory the pensioner resides does not take away the right to higher benefits awarded previously by another Member State: the benefits paid by the Member State of residence were to be supplemented by the other Member State in order to make up the difference between the two amounts. The Court cited the earlier judgment in *Rossi* and attributed to it the principle that Community rules could not be applied in such a way as to lead to a reduction in the benefits payable to a migrant worker or his dependants by virtue of national law *supplemented by Community law*. [14] Community law 'must guarantee to workers who move within the Community all the benefits which have accrued to them in the various Member States whilst limiting them "to the greatest amount" of such benefits'. [15]

12. In *Gravina* v *Landesversicherungsanstalt Schwaben*, [16] a case concerning German orphans' pensions to which the Italian-resident orphans in question had a purely national right, the Court stated that, as a result of exercising their right to free movement, workers should not lose 'social security advantages guaranteed to them, *in any event*, by the legislation of a single Member State'. [17] The Court invoked the judgment in *Rossi* and ruled that 'Article 78(2)(b)(i) [of the Regulation] must be interpreted as meaning that the entitlement to benefits payable in the State in whose territory the orphan to whom they have been awarded resides does not remove the entitlement to benefits greater in amount *previously acquired under the legislation of another Member State alone*' (emphasis added). It applied the supplement principle to such cases.

13. In subsequent cases, the Court cited *Laterza* when ruling that there was entitlement to a supplement 'where ... the amount of the benefits paid by the State of residence

13 — Case 733/79 [1980] ECR 1915.

14 — Paragraph 8 of the judgment in *Laterza*. As will be clear from the quotations above, this conclusion paraphrases somewhat the judgment of the Court in *Rossi*.

15 — Paragraph 8 of the judgment in *Laterza*.

16 — Case 807/79 [1980] ECR 2205.

17 — Paragraph 6 of the judgment, emphasis added.

[pursuant to Article 77(2)(b)(i) of the Regulation] is lower than that of the benefits granted by another State which is responsible for payment [of a pension]'; [18] and repeated that 'the rules contained in [the Regulation] must guarantee to workers who move within the Community all the benefits which have accrued to them in the various Member States whilst limiting them "to the greatest amount" of such benefits'. [19] The Court also invoked its judgment in *Gravina* to rule that 'Articles 77 and 78 [of the Regulation] must be interpreted as meaning that, where a deceased father has been subject to the legislation of more than one Member State, entitlement to an orphan's pension acquired under the legislation of the Member State which is competent according to those provisions does not extinguish entitlement to higher orphans' benefits under the legislation of another Member State alone'. [20] Notwithstanding the use of this last phrase, the supplement principle was applied in all these cases, irrespective of whether the rights in question were purely national or arose only by virtue of the coordinating provisions of the Regulation.

14. The Court's decision in *Athanasopoulos* [21] related to a number of persons who were resident in Member States other than Germany and who (in so far as is relevant to the present case) were either recipients of pensions under the legislation of both Germany and another Member State, or were the successors in title of persons who had been engaged as workers or self-employed persons in both Germany and another Member State. They were applicants either for German dependent children's or orphans' benefits, or for supplements from the German authorities to the equivalent benefits received in their Member States of residence. In some cases, the benefits or the benefit supplements were claimed in respect of children who were born after the applicants left Germany, so that the applicants in those cases had not previously been in receipt of German benefits in respect of those children. It is nowhere stated in the judgment of the Court or the Opinion of the Advocate General that the applicants were in receipt of pensions acquired on the basis of German law alone, or were the successors in title to workers or self-employed persons who had made sufficient contributions in Germany to be entitled to a pension on the basis of German law alone. [22]

15. The Court indicated, in response to the first question referred in *Athanasopoulos*, that it was inherent in the earlier cases on supplements to children's and orphans'

18 — Case 242/83 *Caisse de Compensation pour Allocations Familiales* v *Patteri* [1984] ECR 3171. It appears from paragraph 3 of the judgment that the pensioner in question had received Belgian family allowances in respect of his dependent children before he moved his residence to Italy, where the amount of the equivalent benefits was lower.

19 — Case 1/88 *Baldi* v *Caisse de Compensation pour Allocations Familiales* [1989] ECR 667, paragraph 22 of the judgment. The Belgian orphan's allowance, previously enjoyed in full by the applicant, and which supplemented that provided under Italian law once he had moved his residence to Italy, could not be granted under Belgian law alone after that move because it was subject to a residence condition.

20 — Case 320/82 *D'Amario* v *Landesversicherungsanstalt Schwaben* [1983] ECR 3811. The Court restated this position in Case 269/87 *Ventura* v *Landesversicherungsanstalt Schwaben* [1988] ECR 6411, paragraph 14 of the judgment.

21 — Cited in footnote 1 above.

22 — The order for reference indicates that one applicant, Athanasopoulos himself, had worked for only 40 months in Germany, whereas German law appears to require a minimum of 60 months' social insurance contributions for entitlement to a pension to arise. However, Athanasopoulos was granted a pension while resident in Germany and was not one of those claiming in respect of children born after the change of residence from Germany to another Member State.

benefits that a residence condition attached to the benefits in the Member State responsible for paying the supplement could not be applied — the right to a supplement is conferred 'specifically where [the dependent children or orphans] are not resident within the territory of the Member State granting the more favourable benefits'. [23]

16. For reasons which will be set out in detail in the discussion below, the Court ruled, in response to the second question in *Athanasopoulos*, that entitlement to benefit supplement for dependent children of pensioners exists even where the pensioner only becomes entitled to a pension under the legislation of the Member State granting the more favourable benefits after he has transferred his residence to another Member State which is responsible for payment of benefits under Article 77(2) of the Regulation, and that the supplement must be granted, having regard to all the dependent children of the pensioner, including those born after he has transferred his residence to the Member State which grants the less favourable benefits.

17. In *Durighello*, [24] the Court was concerned with a family allowance for dependent spouses which was awarded to pensioners in Italy. The Regulation does not expressly provide for the grant of such benefits to pensioners. The case related to a pensioner resident in Italy whose entitlement to an Italian pension arose only after aggregation of periods of insurance in a number of Member States, as provided for by Article 45(1) of the Regulation. Advocate General Van Gerven pointed out in his Opinion that the referring court appeared to be of the opinion that the recipient of an Italian pension awarded on the basis of aggregation was also entitled to a dependent spouse allowance as a matter of Italian law, so that the only question was whether Articles 77 to 79 had the effect of depriving him of this right. [25] This negative formulation would limit the significance of *Durighello*. The case would be concerned only with the unlikely hypothesis that the Regulation would deprive a person of a right granted independently by national law. The Court stated that the Regulation 'cannot prevent him from receiving the allowances for pensioners available under national law'. The Court continued, that the provisions for family benefits for pensioners in respect of children in Articles 77 to 79 'cannot be interpreted so as to deprive a migrant worker in a situation such as that at issue in the main action of benefits which he could have claimed if the legislation of a single Member State had been applicable to him'. [26] The operative part of the Court's judgment stated that Articles 77 to 79 of the Regulation 'cannot be interpreted as precluding a Member State's legislation which provides for family allowances for a pensioner's dependent spouse from applying in the case of a person in receipt of an old-age pension pursuant to

23 — Paragraph 21 of the judgment.

24 — Case C-186/90 [1991] ECR I-5773.

25 — Paragraph 11 of his Opinion.

26 — Paragraphs 16 and 17 of the judgment.

Regulation 1408/71'. This reproduces almost verbatim the ruling recommended by Advocate General Van Gerven in his Opinion.

18. However, Advocate General Van Gerven adopted a broader analysis. He stated that 'it is apparent from the Court's case-law on Article 51 of the EEC Treaty, on which the Regulation is based, that Mr Durighello *cannot lose* a right acquired under Italian legislation to an allowance for his dependent spouse'. [27] He had, none the less, insisted earlier [28] that the pension in question was a pension derived directly from Italian legislation, albeit 'supplemented' by Article 45(1) of the Regulation. By virtue of that provision, the Italian authorities could not refuse a pension where the requisite period of insurance could be made up having regard to periods spent in other Member States. What applied to pension entitlement also applied to allowances which were based on national legislation and linked to pension entitlement. These remarks suggest that, in his view, as a matter of Community law, national authorities are *not entitled* to differentiate in any way between purely national and aggregated pensions even as regards the award of contingent benefits not expressly governed by the Regulation.

Administrative measures

19. The Administrative Commission adopted Decision No 150 [29] in the light of the judgment of the Court in *Athanasopoulos*. Paragraph 1 of Decision No 150 states:

'Where the amount of the benefits referred to in Article 77(1) of Regulation (EEC) No 1408/71 due under the legislation of a Member State, irrespective of the place of residence of the children, of the beneficiary to a pension or of orphans on the territory of the Community, is higher than the amount of benefits due under the legislation of the Member State competent in accordance with Article 77(2) of that Regulation, the benefits provided for by the legislation of the first State shall be paid to the pensioner in accordance with the provisions of paragraph 4 of this Decision to the extent that the amount of these benefits exceeds the amount actually received under the legislation of the second Member State. This provision shall be applicable even if the person concerned acquires a right to the grant of a pension under the legislation of the Member State granting the more favourable benefits, after having transferred his residence to the Member State competent in accordance with Article 77(2) of the said Regulation.'

27 — Paragraph 13 of his Opinion, emphasis added.

28 — Paragraph 12 of his Opinion.

29 — Decision No 150 of 26 June 1992 concerning the application of Articles 77, 78 and 79(3) of Regulation (EEC) No 1408/71 and of Article 10(1)(b)(ii) of Regulation (EEC) No 574/72, OJ 1993 C 229, p. 5.

20. Paragraph 2 of Decision No 150 states:

'Where the amount of the benefits referred to in Article 78(1) of Regulation (EEC) No 1408/71 due under the legislation of a Member State, irrespective of the place of residence of the orphan on the territory of the Community, exceeds the amount of benefits due under the legislation of the Member State competent in accordance with the provisions of Article 78(2) of the said Regulation, the benefits provided for by the legislation of the first Member State shall be paid to the orphan in accordance with the provisions of paragraph 4 of this Decision to the extent that the amount of these benefits exceeds the amount actually received under the legislation of the second State. This provision shall be applicable even if the orphan has not resided in the first Member State.'

21. Paragraph 4 of Decision No 150 states, in relevant part:

'In the cases referred to in paragraphs 1 [and] 2 ... the competent institution of the first Member State shall award a supplement to the benefits granted under the legislation of the second Member State, equal to the difference between the amount of the benefits actually received under the legislation of the second Member State and the amount of the benefits due under the legislation of the first Member State, irrespective of the place of residence on the territory of the Community. This supplement shall be determined taking account of all the children or orphans born before or after the transfer of residence ... .

This supplement shall be granted as long as the conditions required for entitlement to benefit under the legislation of the first Member State are satisfied. Where the qualifying conditions for benefit under the legislation of the second Member State are not or are no longer satisfied, the first Member State shall pay, instead of the supplement, the full amount of the benefits due under its legislation, irrespective of the place of residence on the territory of the Community.'

German law

22. As regards orphans, German law distinguishes between an orphan's pension and an orphan's allowance. Orphans are entitled to an orphan's pension where the deceased parent made at least 60 months' social insurance contributions. [30] The grant of allowances for dependent children and orphans is subject to common rules in Germany, which are the same, for present purposes, as those applicable at the time of the decision in *Athanasopoulos*. Except for the case of parents in receipt of pensions awarded before 1 January 1984, who continue to be entitled to a pension supplement in respect of dependent

30 — Paragraph 48 of the *Sozialgesetzbuch VI* ('SGB VI') read in combination with paragraph 50 SGB VI. The SGB VI was introduced by the *Rentenreformgesetz* 1992 of 18 December 1989 (BGBl. I, p. 2261) and entered into force on 1 January 1992, replacing paragraphs 1226 to 1261 of the *Reichsversicherungsordnung* ('RVO': the National Social Insurance Code).

children born before that date, [31] there is no link in German law between entitlement to a pension (whether parent's or orphan's) and entitlement to an allowance, known as *Kindergeld*, for dependent children or orphans. Any person domiciled or normally resident in Germany is entitled to a *Kindergeld* dependent child allowance in respect of children who are similarly domiciled or resident. [32] The same simple residence condition governs entitlement to a *Kindergeld* orphan's allowance. [33] *Kindergeld* is granted until the child reaches the age of 18; however, it can be extended to the age of 21 if the child is unemployed, or until the age of 27 if the child is engaged in further education. [34]

The instant case

Facts

23. This case arises from six claims for full or supplementary German allowances for dependent children and orphans. Four of the applicants are Spanish nationals and former migrant workers who are in receipt of invalidity pensions from the German pension insurance institutions. These pensions are not based on German legislation alone, because the claimants either did not complete insurance periods totalling 60 months in Germany or did not comply with other requirements. [35] The shortest period spent by any of the applicants in Germany was 15 months. The pensions were awarded under Article 45 of the Regulation after aggregation of additional periods of insurance in Spain. The other two applicants are the widows of migrant workers, Italian and Spanish respectively, who receive widows' pensions from the German pension insurance institutions based upon aggregation of the decedents' periods of insurance in Italy and Spain, respectively, with their otherwise inadequate periods of insurance in Germany. Their children do not receive orphans' pensions, nor are such pensions sought in the present case. The applicants receive Spanish dependent children's or orphans' benefits, as the case may be, in respect of their children, or, in the Italian case, received Italian orphan's benefit until the child in question ceased to be eligible, having reached the age of 18 years. None of the applicants is in receipt of a pension awarded before 1 January 1984. All but one of the children concerned were born after their respective parents left Germany.

31 — Paragraphs 583 and 1262, RVO.

32 — From 1996 onwards, this allowance will normally be received by German residents by way of a reduction in taxes due, under the Einkommensteuergesetz ('EStG': Law on Income Tax), as amended by the Jahressteuergesetz 1996 of 11 October, 1995 (BGBl. I, p. 1250). Paragraphs 1(1)(1) and 2(5) of the *Bundeskindergeldgesetz* ('BKGG': Federal Law on Child Allowance) are the residual basis of entitlement of persons who do not come within the terms of the EStG. However, the term *Kindergeld* will be used in this text to describe such German allowances irrespective of their legislative source.

33 — Paragraph 1(2), BKGG.

34 — Paragraph 32, EStG and paragraph 2(2) and (3), BKGG.

35 — See paragraph 1247(2a), read in conjunction with paragraph 1246(2a), RVO: there is no entitlement to a pension under German law alone where the event insured against occurred after 30 June 1984 and at least 36 compulsory contributions were not made to the German pension insurance scheme in the 60 months preceding the event insured against.

24. The applicants applied to the German authorities for their Spanish benefits to be supplemented by the German authorities by the difference between those benefits and the *Kindergeld* allowances obtaining in Germany or, in the Italian case, for payment of a full German orphan's allowance (due to the differing maximum ages). These applications were refused, on the grounds either that the applicant parents were not in receipt of pensions granted solely on the basis of German legislation or that the orphans' deceased parents had not made sufficient contributions to establish entitlement to an orphan's pension under German law alone.

25. The German authorities accept that if there is a German pension on the basis of aggregation, they are obliged, under Article 77(2)(b)(i) of the Regulation, to pay children's or orphans' allowances where the pensioner or orphan resides in Germany. They also acknowledge that they are obliged, under Article 77(2)(b)(ii), to pay children's and orphans' allowances where there is no provision for such benefits in the State of residence and if the German contribution periods (without counting those in the Member State of residence) are the longest.

The order for reference

26. The Ninth Chamber of the Sozialgericht Nürnberg (hereinafter 'the national court'), before which the applicants sought relief against refusal of full or supplementary allowances, explained in its order for reference that the practice of the German social security authorities in cases such as the present is based on the case-law of the Bundessozialgericht (Federal Social Security Court) which, relying on the decisions of the Court in *Laterza* and *D'Amario*, restricts the grant of family allowances which are contingent on receipt of pensions under the RVO to recipients of pensions founded on German insurance periods alone. As has been pointed out in paragraph 22 above, the scope of application of this legal regime is now subject to considerable temporal limits, and it does not apply to any of the applicants in the present case. The national court pointed out that the grant of *Kindergeld* allowances depended on residence, not on the drawing of insurance benefit. However, the authorities' reasoning may have led the applicants to invoke the decision of the Court in *Durighello* as well as that in *Athanasopoulos*, as the former case concerned the grant of benefits which are dependent, as a matter of national law, on receipt of a national pension.

27. The national court also observed that the defendant authorities' approach had the consequence that no German family allowances were payable, even as a supplement, if

benefits were provided for, however small, by the State of residence, whereas the full German allowances were paid if benefits were not available in the State of residence. However, the applicants' approach would enable those who made compulsory insurance contributions in Germany for as little as a year to acquire a right to allowances, or allowance supplements, which, in view of their potential duration and amount, might far exceed all the contributions and tax payments by the migrant worker in Germany.

28. In order to enable it to give judgment in the main proceedings, the national court referred the following questions to the Court under Article 177 of the Treaty:

'1) Must Article 77(2)(b) in conjunction with Article 79(1) of Regulation (EEC) No 1408/71 be interpreted as meaning that family allowances for dependent children of pensioners who have acquired entitlement to a pension in a Member State not only on the basis of the legislation of that Member State but also on the basis of the coordinating provisions of European social law are to be paid by the Member State in which the pensioners do not reside as a benefit supplement equal to the difference between the amount of the benefits provided for in that Member State and the benefits paid or provided for by the State of residence?

2) Must Article 78(2)(b) in conjunction with Article 79(1) of Regulation (EEC) No 1408/71 be interpreted as meaning that family allowances for orphans of a deceased worker or self-employed person who was subject to the legislation of several Member States, if entitlement to an orphan's pension in a Member State whose law applied does not exist solely on the basis of the legislation of that Member State or on the basis of the coordinating provisions of European social law, are to be paid by the Member State in which the orphans do not reside as a benefit supplement equal to the difference between the amount of the benefits provided for in that Member State and the benefits paid or provided for by the State of residence?

3) If the replies to Questions 1 and 2 are in the affirmative and there is entitlement to family allowances, must the amount of the benefit supplement be reduced according to the ratio between the periods of insurance in the Member State and the periods of insurance of the same kind in the State of residence (or another Member State)?'

Procedure

29. Written and oral observations were submitted by the applicants in the main proceedings, the Commission, the Federal Republic of Germany and the Kingdom of Spain.

Analysis

The first and second questions

30. Two distinct principles can be identified from the case-law on the interpretation of Articles 77 to 79 of the Regulation which is outlined at length above, although both ultimately flow from the need to remove obstacles to the free movement of workers. The first is the principle of respect for rights based on the provisions of national law alone. The Court has rightly emphasized that the provisions of Community social law, adopted on the basis of Article 51 of the Treaty, which are designed to assist migrant workers, should not have the effect of depriving them of national social security benefits to which they are entitled, in any event, on the basis of the law of one Member State alone. Otherwise, Community law would actually cause migrant workers to suffer for having exercised their right to free movement under the Treaty by depriving them of part of the benefits to which they had become entitled under the law of that State. In the field of family allowances, the Court has ruled, in cases where one of two family allowances is granted on the basis of national law alone, that Community anti-cumulation provisions should not be interpreted so as to deprive a person of the highest benefit available, whether it be that based on national law or on the coordinating provisions of Community law. More pertinently to the present case, it has ruled, in *Gravina*, *D'Amario* and *Ventura*, that the Member State responsible for payment of higher purely national benefits should supplement Community-coordinated benefits under Articles 77 and 78 of the Regulation by the amount necessary to make up the disparity. Furthermore, there is no reason why the application of the rule against loss of more beneficial, purely national entitlements should be restricted to cases where the national benefit was awarded and enjoyed before the grant of the lower, Community-coordinated benefit, as was the case in *Gravina*. Thus, although the Court referred in the operative part of its judgment in that case to benefits '*previously acquired* under the legislation of another Member State' (emphasis added), the condition of prior acquisition was dropped in *D'Amario*, where the applicant, who had always resided in Italy, sought to avail of a German orphan's pension for the first time.

31. The second principle is that of the preservation of accrued rights, irrespective of whether they were acquired on the basis of national law alone or pursuant to the coordinating provisions of Community law. The Court has sought to eliminate the disincentive which affects workers in the form of the loss of social security benefits which they receive in one State when they travel to another. Such a disincentive arises inevitably if the level of benefits depends on the place of residence. This is, to some extent, inescapable, as Community law has not sought to harmonize national social security systems or benefit levels. However, provisions of Community law should not be interpreted

so as to perpetuate this problem even in respect of benefits granted on the basis of Community coordination. For this reason, the Court has significantly qualified the residence-related allocation of responsibility under Articles 77(2)(b) and 78(2)(b) of the Regulation for the grant of family benefits in respect of children of pensioners or deceased workers who were subject to the legislation of more than one Member State. Where a person has already enjoyed the higher benefits granted in another Member State, that State remains liable for the difference between those benefits and those awarded by the State of residence, as was established in *Laterza*, *Patteri* and *Baldi*. This principle applies equally to rights acquired on the basis of national law alone (which will, in any event, be subject to the first principle outlined above, to the extent that national law alone permits their 'export') and to those enjoyed only by virtue of Community coordination.

32. It should be noted that the scope of application of Articles 77(2) and 78(2) of the Regulation is not restricted to family benefits award of which is made contingent, by national law, on receipt of a pension or on periods of contribution equivalent to those necessary for the award of a pension (although Article 79(1) makes special provision for such situations). Rather, receipt of a pension or pensions, or the deceased parent's working periods in one or several Member States, act merely as conditions precedent for the application of the regime established by Chapter 8 of Title III of the Regulation, irrespective of national rules on the award of family benefits. This is also true of the two principles just outlined. While the transferability of family benefits outside the Member State's territory, where that is possible under national law, will probably often be contingent on receipt of a pension or on a certain number of social insurance contributions having been made, the first principle set out above does not, in itself, depend on any such connection. In any event, a level of benefits equivalent to that provided under purely national law must be guaranteed to the pensioner or orphan in question. Similarly, the second principle, on preservation of accrued benefits, is not limited in any way by the manner in which such benefits were first acquired. Indeed, the classical situation in which the principle can be applied is where a person who receives benefits by virtue of Article 77(2)(b)(i) of the Regulation changes residence. As has already been stated, the application of that provision is not limited to family benefits which, as a matter of national law, are contingent on receipt of a pension or on compliance with contribution or other requirements.

33. As a result, the application of neither principle is subject, a priori, to entitlement to a purely national pension or to a deceased parent having made the requisite number of contributions (save to the extent, for the purposes of the first rule, that grant of purely national rights is subject to these conditions). Because both principles apply in circumstances governed by Articles 77(2)(b) and 78(2)(b) of the Regulation, they necessarily extend to situations where a pension has

been awarded in more than one Member State, or a deceased worker has been subject to the legislation of more than one Member State, without purely national conditions for entitlement having been satisfied. Those Articles, as provisions of Community coordinating legislation, are at least as much concerned with situations where national pension rights are acquired in a number of Member States by virtue of aggregation as they are with situations of multiple pension entitlements where one or more of the pensions in question is based on national law alone.

34. Turning now to the decision of the Court in *Athanasopoulos*, three preliminary points are worth reiterating regarding the Court's response to the second question referred in that case. First, the German family allowances in question were not, in principle, as a matter of national law, subject to receipt of a pension. [36] This remains the position in the present case. Secondly, the national rules made entitlement to the allowance dependent on the residence of both parent and child, or of the child alone in the case of full orphans, so that the case could not have related to the preservation of the effects of a purely national right. This is also true of the present case. Thirdly, nothing in *Athanasopoulos* indicates expressly that all the applicants were entitled to German pensions on the basis of national law alone and no such proposition is advanced by either the Court or the Advocate General. Nor, as will be seen, is the reasoning in the judgment such that the fact of having such a purely national entitlement, rather than a pension awarded on the basis of aggregation, could have been of any relevance to the eventual outcome.

35. The second question referred in *Athanasopoulos* asked, in relevant part, whether there was a right to a supplement representing the difference between German family benefits and those provided in the Member State of residence 'when the pension entitlement does not arise until after the transfer of residence to the home country [and asked whether in] those circumstances, ... a child allowance [is] payable to a pensioner only in respect of those members of his family who qualified for it prior to his transfer of residence, or in respect of all those who are members of his family at the time when he receives the pension — including those who were not born until after he had transferred his residence'.

36. The Court first pointed out that the order for reference had mentioned the *Laterza* principle of the preservation of the effect of 'higher benefits awarded previously by another Member State', and had suggested that it sought to guarantee solely the maintenance of rights acquired prior to the

36 — Even those in receipt of pre-1984 pensions who enjoyed pension supplements in respect of children born before that date were stated in *Athanasopoulos* to be able to have recourse, where benefits were greater, to the general system of children's allowances; see the Report for the Hearing, p. I-2802.

change of residence. [37] This indicates that the case was understood to relate to the scope of the second principle set out above. The Court then stated that Article 77 of the Regulation linked entitlement to the benefits referred to therein to entitlement to a pension, the benefits being granted by the Member State or one of the Member States responsible for payment of a pension. [38] The basis of the entitlement to a pension (whether national law alone or otherwise) is not mentioned.

37. The principle of preserving the effects of accrued family benefits recognizes the difficulty pensioners might experience in choosing between transferring residence and maintaining family benefits to which they are accustomed. However, the Court recast the principle in broader terms in *Athanasopoulos*. The Court characterized the recognition of entitlement to a benefit supplement as a rule which 'seeks to promote freedom of movement for workers by ensuring that those concerned obtain the amount of benefits which would have been granted to them if they had continued to reside in the Member State granting the most favourable benefits'. [39] 'If entitlement to that supplement were not conferred on workers acquiring a right to the grant of a pension under the legislation of the Member State granting the most favourable benefits, following the transfer of their residence to the territory of the other Member State responsible for paying a pension to them, an obstacle would arise to the free movement for workers.' [40] These general remarks relate not only to previously accrued benefits (that is, benefits enjoyed in Germany before transfer of residence) but also to those which would have been acquired had the pensioner stayed in Germany: [41] if a supplement were not granted in such cases as well, 'workers would be prompted to maintain their residence in the territory of the Member State granting the more favourable benefits until the date on which they were entitled to the grant of a pension under the legislation of that Member State, in order to receive those benefits', contrary to the objectives of the Regulation. [42] 'Those considerations also require the benefit supplement to be granted in respect not only of the pensioner's dependent children born before the transfer of his residence to the Member State granting the less favourable benefits, but also children born after the transfer of residence'. [43]

38. The Court was engaged, in responding to the second question in *Athanasopoulos*, in interpreting Article 77(2)(b) of the Regulation. The application of that provision is triggered by receipt of pensions under the law of more than one Member State. The legal framework in which the Court operated and the reasoning on the basis of which it answered the question relate as much to multiple pensions acquired on the basis of

37 — Paragraph 31 of the judgment.

38 — Paragraph 32 of the judgment.

39 — Paragraph 33 of the judgment.

40 — Paragraph 34 of the judgment.

41 — The operative part of the judgment of the Court in *Baldi* was sufficiently broadly worded to extend to such cases. However, the case related to previously enjoyed rights, and the Court referred in paragraph 22 of the judgment to 'accrued rights'.

42 — Paragraphs 35 and 36 of the judgment.

43 — Paragraph 37 of the judgment.

aggregation as to those acquired on the basis of national law alone. It was to prospective Community-coordinated entitlements, related to Community-coordinated pensions as much as to purely national ones, that the Court referred. What is important is the fact that, irrespective of whether a person receives a German pension on the basis of wholly German contributions or on the basis of aggregation, he would, if also in receipt of a pension under the law of another Member State, be entitled to a *Kindergeld* children's allowance if he resided in Germany, on the basis of Article 77(2)(b)(i) of the Regulation. He would, therefore, in the Court's view, be deterred from transferring residence, even before the realization of the condition precedent under that Article (grant of a pension), by the prospect of losing such future benefits guaranteed by Community law. The same was true of the other, factual condition precedent, the birth of children. Similarly, when Advocate General Van Gerven referred to situations where the requirements for a pension entitlement have been fulfilled as ones where 'the right to a pension *and with it the right to child allowances* is acquired conditionally', [44] the contingency of the child allowance on the ultimate grant of the pension arises as a matter of Community law, irrespective of how national rules link the two benefits and any periods of contribution or other requirements. Thus, his, and the Court's, prescription that a merely prospective entitlement to such children's allowances should be preserved, by way of supplement to allowances awarded after moving to another Member State, relates to an entitlement directly countenanced by Article 77(2)(b)(i) of the Regulation. As that provision clearly relates to multiple pensions acquired by aggregation as well as to those awarded on the basis of national law alone, there is no basis to limit the effects of the decision to the latter type of pension.

39. In the light of this analysis, it is clear that the four applicant pensioners in the present case fall within the scope of the ruling and the reasoning of the Court in *Athanasopoulos*. The interpretation contended for by Germany, which seeks to restrict the application of the ruling in that case to persons in receipt of a pension pursuant to German law alone, effectively treats the decision as having been based on the first principle identified from the case-law, that of preserving the effect of purely national entitlements. However, there was no purely German entitlement to child benefit in *Athanasopoulos*, because of the residence requirement in German law. Furthermore, the approach adopted by the German authorities in respect of the applicants in the present case makes entitlement to a benefit supplement, pursuant to the Court's interpretation of Article 77(2)(b) of the Regulation in the light of Article 51 of the Treaty, subject to a condition — receipt of a purely German pension — which is not imposed either by the terms of that provision, which clearly relates to

44 — Paragraph 15 of his Opinion, emphasis added.

pensions acquired pursuant to aggregation as well as to purely national pensions, or by national law, which does not make receipt of *Kindergeld* allowances contingent on any criterion other than residence. As the Court indicated in response to the first question in *Athanasopoulos*, the existence of such a residence criterion in national law is no bar to the application of the supplement principle.

40. It is worth noting that Decision No 150 of the Administrative Commission, adopted in the light of *Athanasopoulos*, appears to be based on a similar interpretation of the judgment to that just outlined. It makes no distinction between pensions granted on the basis of aggregation and those based on the law of one Member State alone. Nor does it seek to restrict the application of the judgment to cases where family benefits are contingent, as a matter of national law, on receipt of a national pension.

41. Even if it were the case that German family allowances were dependent, as a matter of German law, on the grant of a pension or on the making of a specified number of contributions, [45] the position would probably be the same in the present case. Because residence in Germany would give a person in receipt of a German pension acquired only on the basis of aggregation a right to German family benefits pursuant to the express terms of Article 77(2)(b)(i) of the Regulation (after the application, where necessary, of the aggregation provisions of Article 79(1)), the reasoning of the Court in *Athanasopoulos* would dictate that that person should not face the disincentive to free movement to another Member State that would be posed, even before award of such a pension or the birth of children, by the loss of that possible prospective level of benefit.

42. The decision of the Court in *Durighello* does not add anything to the present analysis. *Durighello* could, perhaps, be relied upon to argue that the principle of preserving the effects of purely national rights, and, by corollary, of national rights contingent on other purely national entitlements, should be extended to permit the export, by way of supplement, of national rights which are contingent on the grant of another national benefit, such as a pension, irrespective of whether the latter is acquired on the basis of national law alone or only by virtue of aggregation. That is a significant question, but is quite distinct from that posed in either *Athanasopoulos* or the present case, as German *Kindergeld* allowances are not dependent on receipt of a pension of any description. Thus, there is no need for me to address that question here, or to express a

45 — The grant of an orphan's *pension* is subject, in German law, to the deceased parent having made at least 60 months' contributions. As has been pointed out above, the present case, in so far as it relates to orphans, is concerned only with orphans' *allowances* under the *Kindergeld* regime.

view about whether that ambitious argument should be accepted in an appropriate case.

The third question

43. I now turn to the position of orphans, addressed by the second question referred by the national court. This was not raised directly by the second question in *Athanasopoulos*, but the reasoning of the Court in that case applies to orphans' benefits as well, and was understood to do so by the Administrative Commission. This is clearly the case regarding an orphan whose deceased parent had already been granted pensions under the laws of the Member States where he had worked before his death. The last sentence of Article 78(2) of the Regulation provides that the legislation regarding dependent child benefits which applied before the pensioner's death shall continue to apply. In the case of orphans of deceased workers who were subject to the legislation of more than one Member State, there would exist the same disincentive to reside in a Member State other than that where the highest benefit is payable as was identified in the case of workers themselves in *Athanasopoulos* if the level of orphans' allowances were determined solely by reference to the law of their place of residence. This would present an impediment to the exercise of rights of free movement by a surviving parent or guardian, as the Commission pointed out in its observations. Thus, a supplement should be paid equal to the difference between the amount of benefit payable in the Member State of residence of the orphan of a deceased worker and the higher amount to which he would be entitled if he resided in another Member State.

44. It is inherent in the reasoning which underlies the supplement principle, as applied in *Athanasopoulos* and as it applies in the instant case, that the full amount of the highest dependent child or orphan's benefit payable under Articles 77(2) or 78(2) of the Regulation should be guaranteed to a pensioner or an orphan, as the case may be. If the amount of the supplement were reduced, in accordance, for example, with the ratio between the periods of insurance in the various Member States involved, as was suggested by the national court, the disincentive to the exercise of the right of free movement would be, to that extent, unacceptably maintained. Provided the principle of maintaining the highest accrued or conditionally acquired entitlement is observed, it may be open to the Community legislator to allocate differently the costs of implementing this principle, but the Regulation itself does not provide any guidance on this matter. As the Commission observed, the calculation of benefit levels on a pro rata basis under Article 79(1) of the Regulation arises only where either entitlement itself or the amount payable in the responsible Member State is contingent on the length of periods of insurance, work or residence, which is not the case in Germany. Even if it were the case, Article 79(1) would require the German authorities to calculate whether and in what amount an allowance would be payable *by them* to a pensioner or orphan resident in Germany by aggregating periods spent in all

the Member States. That amount would then be the basis for calculating any necessary supplement to the benefits paid to the pensioner or orphan in question under the law of a different Member State of residence.

45. I appreciate the concern of the German social security authorities about the effect of the decision in *Athanasopoulos* on the entitlements of workers who have spent only very short periods in Germany. The Community legislator and the Court have striven, through the enactment and interpretation of the Regulation, to ensure that workers do not face disincentives to the exercise of the right of freedom of movement arising from the operation of national social security systems. It is necessary, for such purposes, to adopt objective criteria regarding the existence of such disincentives, irrespective of whether individual workers are sufficiently well-informed about disparities of entitlement for this to affect their own decisions. As a result, the identification of disincentives has a tendency to be formalistic. This has the effect that little account is taken of the slight weight a particular perceived disincentive is likely to have in the calculations of a worker, in the light, for example, of its temporal remoteness. There must be a considerable difference in degree between the disincentive felt, in reality, by a pensioner who fears losing part of a dependent child allowance which he currently enjoys and which is part of his household budget and that felt, if at all, by a worker in his twenties who has yet to have children and for whom retirement is a distant prospect. However, the calculations of a worker who is approaching retirement would probably be closer to those of the pensioner than to those of the young worker in the examples just given, while early invalidity or death can be ruled out by no one. It is impossible to provide separately, by legislation or judicial interpretation, for all the combinations of circumstances in which a particular disincentive will be felt in differing degrees. However, while the objective approach to the identification of disincentives does not, in general, provide for the balancing of the real value of remedying a remote impediment to free movement against the charge imposed by the remedy on Member State social security systems which may have only a slight connection with the benefiting worker, the operation of the supplement principle may have this effect, at least in part. The charge on the German social security system of providing *Kindergeld* allowances for the dependent children of pensioners resident in Germany is alleviated, up to the amount of benefit payable in the Member State of destination, where the pensioner changes residence. The possibility of maintaining existing levels of social security entitlement may play a part in the pensioner's decision in this regard. Furthermore, this alleviation takes place even where the pensioner has spent the greater part of his working life in Germany and only a short period in the other Member State, where he may be entitled to a pension only on the basis of aggregation. Similarly, the future cost of such allowances is reduced where the worker changes residence before the grant of a pension or the birth of his children.

Conclusion

46. In the light of the foregoing analysis, I recommend that the Court answer the questions referred by the Ninth Chamber of the Sozialgericht Nürnberg as follows:

(1) Article 77(2)(b) of Council Regulation (EEC) No 1408/71 must be interpreted as requiring that family allowances for dependent children of pensioners who have acquired entitlement to a pension in a Member State not only on the basis of the legislation of that Member State but also on the basis of the coordinating provisions of Community social law be paid by the Member State in which the pensioners do not reside as a benefit supplement equal to the difference between the higher amount of the benefits provided for in that Member State and the benefits paid or provided for by the Member State of residence.

(2) Article 78(2)(b) of Council Regulation (EEC) No 1408/71 must be interpreted as requiring that family allowances for orphans of a deceased worker or self-employed person who was subject to the legislation of several Member States be paid by the Member State in which the orphans do not reside as a benefit supplement equal to the difference between the amount of the higher benefits provided for in that Member State and the benefits paid or provided for by the Member State of residence, even if entitlement to an orphan's pension does not exist in the Member State responsible for paying the supplement solely on the basis of its legislation or on the basis of the coordinating provisions of Community social law.

(3) The amount of the benefit supplement may not be reduced according to the ratio between the periods of insurance in the Member State responsible for paying the supplement and the periods of insurance of the same kind in the Member State of residence or another Member State.