OPINION OF ADVOCATE GENERAL LENZ

delivered on 12 January 1993 *

Mr President,
Members of the Court,

A — Facts

1. This reference for a preliminary ruling from the Arbeidshof (Higher Labour Court), Brussels, calls for the determination of the scope *ratione personae* of Regulation No 1408/71. [1]

2. The national court seeks a preliminary ruling in a case in which it has to give a decision on the grant of benefits under the Belgian law of 27 June 1969 on disability benefit. [2]

3. The applicant in the proceedings before the national court claims, as the guardian of his handicapped daughter, who is of full age, adult invalidity benefit under Belgian law, comprising a special allowance and an allowance for the assistance of a third person.

4. The applicant is a German national like his daughter who was born on 28 February 1961. He was originally a civil servant at the Bundesanstalt für Flugsicherung (Federal Administration of Aviation Safety). At the beginning of the 1960s he was recruited by the European Organization for the Safety of Air Navigation, Eurocontrol, and settled in Belgium. He was a member of the organization's own social security scheme. He has since retired.

5. His daughter has been handicapped from birth and was thus unable to pursue any employment. She has lived and continues to live in her parents' household, although she spends most of the week in a rehabilitation institution. The applicant has always contributed to the support of his daughter.

6. Up to the age of 25 years, which is the legal age limit for benefits, the Belgian State paid a family allowance plus a supplementary allowance for a handicapped child in favour of the applicant's daughter. The claims submitted by the applicant for his daughter for adult invalidity benefit were rejected on the grounds that his daughter had never been an employed person subject to social security regulations and was a German national. The appeal lodged against this decision was unsuccessful. The national

* Original language: German.

1 — Council Regulation No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, in the version annexed to Council Regulation No 2001/83 of 2 June 1983, OJ 1983 L 230, p. 6, last amended by Regulations 1247, 1248 and 1429/92 of 30 April 1992, OJ 1992 L 136, p. 1.

2 — The Law of 27 June 1969 was partially superseded and amended by the Law of 27 February 1987 and supplemented by the Law of 20 July 1991 which entered into force on 1 August 1991.

court to which the appeal was made has now referred the following questions to the Court:

Must Articles 2 and 3 of Regulation (EEC) No 1408/71 be interpreted as meaning that the application of a Member State's legislation which confers an individual legally protected right to disability allowances extends to a handicapped person who is a national of a Member State but has never been employed, self-employed or a civil servant within the meaning of Article 2 of that regulation and who, in the Member State under whose law on disability allowances a claim is made, was previously in receipt of certain allowances, albeit exclusively on the basis of her status as a handicapped person and without her or her father being subject to any obligation under the legislation or social security scheme of that Member State, though her father, also a national of a Member State, possessed the status of an employed person or civil servant within the meaning of the aforesaid Article 2(1) and (3) but was not subject to the social security scheme, statutory or otherwise, of the Member State under whose legislation she made her claim, or to that of any other Member State as provided for in the regulation?

If the first question is answered in the affirmative:

1. How is the term 'civil servant' in Article 2(3) of Regulation No 1408/71 to be interpreted, in particular does it cover a civil servant of a Member State on unpaid leave who is an official of an international organisation with its own staff regulations and its own social security scheme which grants exemption 'from all compulsory contributions to national social security bodies'?

   If so, does protection extend to members of the family and descendants, even though that is not expressly provided for?

2. Can an individual right be claimed by reference to the status of 'member of family' within the meaning of Article 2(1)? Is that so even if the claimant resides in a subsidized institution supported by a social fund, where the legislation on disability allowances under which the claim is made makes the grant of those allowances conditional on an investigation into the means of subsistence and no longer takes account (after the age of majority has been reached) of the parents' income?

7. Reference is made to the Report for the Hearing for particulars of the facts, the legal background and the submissions of the parties.

B — Opinion

8. The questions submitted for a preliminary ruling are intended to enable the national court to decide whether Belgian adult disability benefits granted on the basis of a personal entitlement are to be granted to the applicant's daughter under Community legislation.

9. It is not contested that the applicant's daughter, Miss Schmid, meets all the requirements to enable her to claim the benefits applied for except for Belgian nationality. In submissions made before the Court of Justice it was suggested that the status of an employed person might, under certain circumstances, be regarded as a substitute for Belgian nationality. The facts allow no scope for this to apply in practice. It is therefore unnecessary to pursue this possibility any further.

10. The application of Community law would have to help the applicant's daughter over the hurdle of Belgian nationality in order to allow her claim to be upheld. Of relevance here might be the principle of equal treatment enshrined in Article 3(1) of Regulation No 1408/71 under which persons who live in the territory of a Member State and to whom this regulation applies have the same rights and obligations under the legislation of any Member State as the nationals of that State.

11. Since the most recent amendment of the Belgian law concerning disability benefits of July 1992, [3] persons who fall within the scope of Regulation No 1408/71 are listed expressly as being entitled to benefit. [4] That amendment to the law gives effect in a Member State's legislation to a legal consequence which already applies by virtue of Community law.

12. The case-law of the Court leaves no doubt that the disability benefits under Belgian law which are at issue may fall within the substantive scope of Regulation No 1408/71. [5] With the most recent amendment of Regulation No 1408/71 [6] this classification was expressly incorporated in the text of the regulation. [7] Even the definition of the members of the family benefiting from the regulation has been amended in respect of disability allowances. In Article 1(f) the following subparagraph (ii) was added:

'Where, however, the benefits concerned are benefits for disabled persons granted under

3 — *Moniteur belge* of 1.8. 1991, p. 16971.

4 — Cf. Article 4(1)(2), cited above.

5 — Case C-39/74 *Costa* v *Belgium* [1974] ECR 1251; Case C-187/73 *Callemeyn* v *Belgium* [1974] ECR 553 and Case C-7/75 *Mr & Mrs F.* v *Belgium* [1975] ECR 679 and cf. the Report for the Hearing in Case C-326/90 *Commission* v *Belgium* [1992] ECR I-5517, arguments of the Commission leading to a judgment against Belgium.

6 — Cf. Regulation No 1247/92 of 30 April 1992 amending Regulation (EEC) No 1408/71 on application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ 1992 L 136, p. 1).

7 — Cf. Article 4(2)(a) and Annex II to Article 10(a) of Regulation No 1408/71.

the legislation of a Member State to all nationals of that state who fulfil the prescribed conditions, the term "member of the family" means at least the spouse of an employed or self-employed person and the children of such person who are either minors or dependent upon such person.'

13. The amending provisions came into force on 1 July 1992 [8] and hence are applicable to this case only since that time. The questions submitted for a preliminary ruling must therefore be assessed in the light of the situation applicable before the amending regulation.

14. Neither a determination that the disability allowances at issue might fall within the material scope of Regulation No 1408/71 nor the express mention thereof in the amended regulation, relieve me of the duty to examine the personal scope of application of the regulation in respect of the allowances in question.

15. This is all the more necessary since the disability benefits in question are hybrid social benefits which cannot be classified clearly either as social security benefits in accordance with Article 4(1) nor as social assistance in accordance with Article 4(4) of Regulation No 1408/71 which is excluded from the scope of the regulation.

16. The Court has consistently held: [9] 'Although it may seem desirable, from the point of view of the application of the regulation, to distinguish between legislation concerning social security and assistance respectively, the possibility cannot be excluded that by reason of the *persons covered thereby*, [10] its objectives and its manner of application, legislation may at the same time fall within both categories, and thus, not be amenable to any overall classification.' [11]

17. Thus the personal scope of the relevant provisions can have a bearing on their substantive scope.

8 — Cf. Article 3 of the amending Regulation No 1247/92, cited above, footnote 6.

9 — Case C-39/74, cited above, paras 5 and 6; Case C-24/74 *Caisse Régionale d'Assurance Maladie* v *Biason* [1974] ECR 999, para. 9; Case C-183/73 *Callemeyn*, cited above, para. 6 and Case C-356/89 *Newton* v *Chief Judication Officer* [1991] ECR 3017. All these judgments concerned aid to disabled persons. Also compare Joined Cases 379/85 to 381/85 and 93/86 *Caisse Régionale d'Assurance Maladie Rhône-Alpes* v *Giletti* [1987] ECR 954, para. 9. This judgment concerned a supplementary allowance.

10 — Emphasis added.

11 — Cf. Case C-39/74 *Costa*, cited above, footnote 5 and Cases C-249/83 *Hoeckx* v *Openbaar Centrum voor Maatschappelijk Welzijn Kalmthout* [1985] ECR 973, para. 12, pointing out that the risk covered must relate to a type of allowance specified in Article 4(1) of the regulation; the judgment concerned a benefit guaranteeing a minimum means of subsistence, like Case C-122/84 *Scrivener* v *Centre Public d'aide Sociale Chastre* [1985] ECR 1027, para. 19, and cf. Case C-9/78 *Directeur Régionale de la Sécurité Sociale Nancy* v *Gillard* [1978] ECR 1661, para. 5, on recognizing periods of captivity as a prisoner of war for the purposes of calculating pensions; the characteristics and purpose of the benefits are used as criteria.

18. With respect to disability benefit, the Court has held:

'Whilst in some of its features, legislation concerning the grant of benefits to handicapped persons is akin to social assistance, especially when need is the essential criterion in its implementation and there are no conditions as to periods of employment, of membership or of contributions, yet it is nevertheless close to social security to the extent that departing from the consideration of each case on its merits — a characteristic feature of assistance — it confers upon beneficiaries a legally defined position. In view of the widely drawn definition of people entitled to benefit, such a legislation fulfils in fact *a double function*, [12] which is on the one hand to guarantee a minimum income to handicapped persons who are entirely outside the social security system and, on the other hand, to provide supplementary means to persons entitled to social security benefits who are permanently incapacitated from work.' [13]

19. Even at the time when Regulation No 3, the predecessor to Regulation No 1408/71, was in force, the Court ruled:

'Accordingly, national legislation giving a legally protected right to a benefit for the handicapped falls, as regards the person covered by Regulation No 3, within the area of social security within the meaning of Article 51 of the Treaty and of the Community regulations thereunder.' [14]

20. In effect, that means that the substantive scope is dependent on the prior question as to the personal scope of the regulation. Soon after the entry into force of Regulation No 1408/71, the Court confirmed its case-law and clearly emphasized once again the requirements determining the persons entitled to benefit under the regulation. The Court held that:

'Thus, as regards an employed person or a person treated as such who is in a Member State entitled to an invalidity pension, legislation that assures the handicapped person a right to "benefit" that is legally protected, falls, so far as these workers are concerned, within the field of social security, within the meaning of Article 51 of the Treaty and of the regulations made thereunder, even if such legislation might fall outside this field as far as other categories of beneficiaries are concerned.' [15]

21. The personal scope of Regulation No 1408/71 is determined in Article 2. Article 2(1) states that:

12 — Emphasis added.

13 — Cf. Case C-39/74 *Costa*, cited above, footnote 5, paras 7 and 8. With regard to the double function of social benefits, see also Case C-139/82 *Piscitello* v *INPS* [1983] ECR 1428, para. 12. This judgment concerned classification of a supplementary pension. See also C-187/73 *Callemeyn*, cited above, footnote 5, para. 8. In this regard see Case C-1/72 *Frilli* v *Belgium* [1972] ECR 457, para. 14 and 15, concerning guaranteed minimum old age pension; also in this regard concerning a supplementary pension payment from a national solidarity fund see Joined Cases C-379 to 381/85 and 93/86, cited above, para. 10.

14 — See *Costa*, cited above, footnote 5, paras 9 to 11.

15 — C-187/73 *Callemeyn*, cited above, footnote 5, para. 11; see in this regard also Case C-356/89 *Newton*, cited above, footnote 9.

'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 in the territory of one of the Member States as well as to the members of their families and their survivors.'

22. Since the benefit claimant, the applicant's daughter, has never been employed and never will be, she does not, by virtue of her own legal status, fall directly within the personal scope of the regulation. She could, however, come under Regulation No 1408/71 as a member of her father's family.

23. In two judgments in the 1970s [16] members of the families of migrant workers in a comparable situation were granted disability payments on the ground that Regulation No 1408/71 was applicable. In Case C-7/75, *Mr & Mrs F.*, the parents of a minor had applied for a disability aid under Belgian law. They were Italian nationals and the father could certainly be considered a migrant worker within the meaning of the regulation.

24. In the grounds of the judgment the Court noted that:

'As regards the enjoyment of rights under national legislation providing benefits for the handicapped, neither the employed person himself nor the members of his family may, as compared with the nationals of the State of their residence, be placed in a less favourable position for the sole reason that they do not possess the nationality of that State.' [17]

25. The Court also held that:

'As regards the case of a handicapped child who from his minority fulfils the conditions required to benefit as a member of the employed person's family from the benefits to the handicapped, the equality of treatment cannot terminate when he ceases to be a minor, if the child by reason of his handicap is prevented from acquiring the status of employed person within the meaning of the regulation. If this were not the case, a worker anxious to ensure his child the lasting enjoyment of the benefits necessitated by his condition as a handicapped person, would be induced not to remain in the Member State where he has established himself and has found his employment, which would run counter to the object sought to be obtained by the principle of free movement of workers within the Community bearing in mind *inter alia* the right recognized under this principle to employed persons and to members of their family to remain within the territory of a Member State in which the employed person was employed under the conditions determined by Regulation No 1251/70 ... .' [18]

26. In Case 63/76 *Inzirillo*, in which a handicapped adult who was an Italian national

16 — Case C-7/75 *Mr & Mrs F.*, cited above, footnote 5 and C-63/76 *Inzirillo* v *Caisse d'Allocations Familiales Lyon* [1976] ECR 2057.

17 — Case C-7/75 *Mr & Mrs F.*, cited above, footnote 5, para. 17.

18 — Cf. Case C-7/75, cited above, footnote 5, paras 18 to 20.

living with his father — considered to be an employee for the purposes of Regulation No 1408/71 — applied for disability aid under French law, the Court fully endorsed its judgment in *Mr & Mrs F.* [19]

27. In the light of this case-law the point on which the assessment of this case hinges is whether the applicant comes within the scope of Regulation No 1408/71. The point of departure in examining this issue is Article 2(1), according to which employed persons and self-employed persons and members of their family and survivors are specified as falling within the personal scope of the regulation and, possibly, Article 2(3) which states that:

'This regulation shall apply to civil servants and to persons who, in accordance with the legislation applicable, are treated as such, where they are or have been subject to the legislation of a Member State to which this regulation applies.'

28. This provision could apply to the applicant since he once possessed, in the course of his career, the status of a German civil servant at the Bundesanstalt für Flugsicherung (Federal Administration of Aviation Safety) and did not lose that status when he entered employment with Eurocontrol but was released from the services of the Bundesanstalt on unpaid leave ('Urlaub ohne Gewährung' [20]). The applicant could also have acquired the status of a civil servant with an international organization or at least the status of a person treated as such as a result of his employment at Eurocontrol.

29. Nevertheless, there are several reasons for doubting that the latter article — Article 2(3) of the regulation — can avail the applicant. The extent to which civil servants and persons treated as such come within the scope of the regulation is limited by reference to the regulation's substantive scope. Only where the legislation of a Member State coming within the substantive scope of the regulation is or was applicable to civil servants or persons treated as such, can this group of persons fall within the personal scope of Regulation No 1408/71. In the same way as the Court, in determining the substantive scope of the regulation with respect to hybrid benefits in Member States' social security systems, refers to the personal scope of the regulation, the Community legislature does the reverse when defining the personal scope of the regulation for civil servants and persons treated as such.

30. In extreme cases this can lead to circuitous reasoning. It is, for example, conceivable that a civil servant or a person treated as such could obtain disability aids for himself or his child, and as a result might come within the personal scope of the regulation, on condition, however, that the legislation under which the benefit was to be granted fell within the substantive scope of the regulation, with the decision as to whether the

19 — Case C-63/76, cited above, footnote 16, paras 15 to 17.

20 — See observations of the applicant, para. 11. This should probably read 'Urlaub ohne Gewährung von Bezügen' ('der ohne Bezüge beurlaubte Beamte'), see the questions submitted for a preliminary ruling, subsidiary question 1.

benefits concerned come within the substantive scope of the regulation turning on whether the regulation is applicable to the claimants.

31. Another reason for doubting that Article 2(3) of Regulation No 1408/71 can avail the applicant is that the members of the family of civil servants and of people treated as such are not designated as beneficiaries under the regulation, at least not expressly.

32. This does not necessarily mean that benefits granted to a civil servant or a person treated as such which fall within the scope of the regulation, cannot, under any circumstances, be in favour of the members of his family. Let us consider, for example, family allowances in accordance with Article 4(1)(h). A civil servant or a person treated as such can, at least in theory, also come within the personal scope of the regulation under Article 2(3), simply because he is in receipt of family allowances.

33. These considerations, however, underline the fact that the concept of a civil servant or a person treated as such within the meaning of Article 2(3) of the regulation cannot be determined in abstract terms, in the sense that certain persons generally count as coming within the personal scope of the regulation, but only in terms of a practical appraisal of the benefits in question, particularly when the beneficiaries are members of the family.

34. In my view the wording of Article 2(3) clearly precludes any personal entitlement on the part of members of the family of potential beneficiaries. Ultimately it is up to the national court to define the legal nature of benefits payable under the legislation of a Member State and the persons entitled under that legislation. It is conceivable that disability benefits for adults might, depending on their aim and purpose and in the light of the *Inzirillo* and *Mr & Mrs F.* decisions, possibly be granted along much the same lines as disability benefits paid in conjunction with family allowances.

35. According to the information available to the Court on the benefits at issue in the case before the national court, it must be assumed that the benefits are granted only to designated beneficiaries with the result that Article 2(3) of the regulation will not apply in favour of the applicant's daughter.

36. The question now is whether the claimant is a beneficiary under Article 2(1) of Regulation No 1408/71. As implied above, this is conditional upon her father being an employed person or a self-employed person within the meaning of the regulation. The Court has defined the Community concept of an employed person in broad terms when interpreting the regulations to secure freedom of movement for workers within the Community.

37. In the *Echternach and Moritz* case [21] the Court held that 'a Community national working in a Member State other than his State of origin does not lose his status of worker within the meaning of Article 48(1) of the Treaty through occupying a post within an international organization, even if the rules relating to his entry into and residence in the country in which he is employed are specifically governed by an international agreement concluded between the international organization and the State in which it is established.'

It follows, in particular, that a child of such a worker of a Member State may not be refused the rights and privileges which Article 48 of the Treaty and Regulation No 1612/68 afford him.

38. As regards the possibility afforded by Article 48(4) of the Treaty to exclude persons from the scope of the other paragraphs of this article, the Court requires a strict appraisal of the situation on the basis of the aim pursued by those provisions. [22]

39. Without it being necessary to examine the details of the case in question, it is already clear from the judgment,

'that Article 48(4) provides only that Member States may exclude nationals of other Member States from access to certain posts in the public service; however, this does not mean that persons whom the Member States have none the less appointed to such posts may be excluded from Community treatment'. [23]

40. Hence,

'a national of a Member State who in another Member State occupies a post governed by a special statute under international law, (...), must be regarded as a worker within the meaning of Article 48(1) and (2) of the Treaty and is therefore entitled, as are the members of his family, to the rights and privileges prescribed in those provisions and in Regulation No 1612/68 of the Council'. [24]

41. In those terms the applicant can easily be classed as an employed person. Nevertheless, it is questionable whether he should also be considered an employed person for the purposes of Article 2(1) of Regulation No 1408/71. In my view, the argument against the concept of an employed person under Article 48 of the Treaty and Regulation No 1612/68 being identical with that in Regulation No 1408/71 is that the latter

21 — Joined Cases C-389/87 and C-390/87 *Echternach and Moritz* v *Minister for Education and Science* [1989] ECR 723, paras 11 and 12.

22 — Cf. Case C-148/79 *Commission* v *Belgium* [1980] ECR 3881, para. 11.

23 — Cf. *Echternach and Moritz*, cited above, footnote 21, para. 14.

24 — *Echternach and Moritz*, cited above, footnote 21, para. 15.

regulation has only limited substantive scope.

42. In the preamble to the regulation it is stated that:

'Whereas the considerable differences existing between national legislations as regards the persons to whom they apply make it preferable to establish the principle that the regulation applies to all nationals of Member States *insured under social security schemes for employed persons.*' [25]

43. Although that is, in principle, a broad definition, it is clearly restricted to the persons subject to the relevant social security schemes. That restriction is confirmed in the regulation discussed above on the personal scope of the regulation for civil servants and persons treated as such, which is limited by substantive criteria.

44. The fact, also, that a distinction is made between employed persons and self-employed persons on the one hand and civil servants and persons treated as such on the other, requires, in my view, that the concept of an employed person be defined with the objectives and substantive scope of the regulation in mind.

45. As a result I consider it doubtful that the applicant can be classed as an employed person as defined in Regulation No 1408/71. As a German civil servant he was, in principle, subject to the civil servants' own social security system. As an employee of Eurocontrol, too, he was covered by a special social security system and, in compliance with Article 24 of the International Convention on Cooperation for the Safety of Air Navigation (Eurocontrol), was explicitly 'exempted from all compulsory contributions to national social security bodies'. [26] If the applicant was, accordingly, not regarded as an employed person within the meaning of Regulation No 1408/71, his daughter could not claim any entitlement derived from her father's status under that regulation.

46. A further consideration makes it doubtful whether the applicant's daughter can successfully rely on Regulation No 1408/71 at all to claim the disability benefits at issue. In *Kermaschek* [27] the Court devised a system for classifying claims for benefit under Regulation No 1408/71 which can be summarized as stating that people belonging to the category of workers can make claims on the basis of personal entitlement, whilst members of the families of beneficiaries under Regulation No 1408/71 can only claim derived rights acquired through their status as a member of a family of a worker. [28]

25 — Emphasis added.

26 — International Convention on Cooperation for the Safety of Air Navigation 'Eurocontrol', amended in 1981, law of 16 November 1984, *Moniteur belge* of 30 April 1985, p. 6014 and *Bundesgesetzblatt* (BGBl.) 1984, Part II 69, 71.

27 — Case C-40/76 *Kermaschek* v *Bundesanstalt für Arbeit* [1976] ECR 1669.

28 — Cf. *Kermaschek*, cited above, footnote 27, para. 7.

47. That principle was developed in Cases C-157/84, [29] C-94/84 [30] and C-147/87. [31] It should, however, be noted that it was not developed specifically for disability aid, [32] unlike in the *Mr & Mrs F.* and *Inzirillo* judgments, and that the *Kermaschek* judgment, the first to distinguish between personal and derived entitlement, was delivered *before* the *Inzirillo* judgment.

48. If, however, those principles were to be applied to the case under examination, the applicant's daughter could not rely on Regulation No 1408/71, since, in accordance with the answers of the Belgian Government and the concurring observations of the parties in the case, the aid for disabled adults is granted only on the basis of personal entitlement.

49. The Court's most recent judgment [33] suggests that it wishes to apply the distinction between personal and derived rights established in *Kermaschek* to disability aid as well. If the Court were to continue to pursue this approach, the applicant could not successfully rely on Regulation No 1408/71 on behalf of his daughter.

50. This interim conclusion does not, however, mean that the applicant cannot successfully rely on Community law.

51. The questions submitted by the national court relate specifically to the interpretation of the provisions of Regulation No 1408/71. The Court, however, is obliged to give a comprehensive ruling on any questions referred to it in order to provide the lower court with all the criteria it needs in order to correctly assess the facts before it in terms of Community law.

52. For this reason the Court is perfectly entitled to comment on provisions under Community law which have a close substantive connection with the provisions expressly mentioned, particularly when the related provisions would inevitably have had to be examined if the questions submitted for a preliminary ruling had been worded in more abstract terms, for the Court is not bound to the exact wording of the order for reference. In practice it interprets it so as to enable it to assess comprehensively the issues of Community law involved.

53. One Community provision which comes to mind in this respect is Regulation No 1612/68. [34] As ascertained above, the applicant can be classed as an employed person under this regulation which was adopted in order to implement freedom of movement. The applicant or his daughter can, if necessary, rely on Article 7(2) of the regulation under which an employed person within the meaning of the regulation enjoys the same social and tax advantages as national workers. Article 10 of the regulation provides that the persons who have the right

29 — Case C-157/84 *Frascogna* v *Caisse des Dépôts et Consignations* [1985] ECR 1739, para. 15.

30 — Case C-94/84 *ONEM* v *Deak* [1985] ECR 1873, para. 11.

31 — Case C-147/87 *Zaoui* v *CRAMIF* [1987] ECR 5511, para. 11.

32 — C-4/76 *Kermaschek*, unemployment benefit, C-157/84 *Frascogna*, old age allowances, C-94/84 *Deak*, unemployment benefit and C-147/87 *Zaoui*, supplementary invalidity allowances for nationals of a non-member country.

33 — Case C-243/91 *Belgium* v *Taghavi* [1992] ECR I-4401, paras 7 and 8.

34 — Council Regulation No 1612/68 of 15 October 1968 on the freedom of movement of workers within the Community, OJ, English Special Edition 1968 (II), p. 475.

to install themselves with the worker include dependent relatives. This means that that group of persons is expressly included in the category of those coming under the regulation.

54. Even if the worker is no longer actively employed, he and his family members within the meaning of Article 10 of Regulation No 1612/68 still enjoy the right to remain in the State of employment under Article 1 of Regulation No 1251/70. [35] Article 7 of Regulation No 1251/70 specifies, moreover, that:

'The right to equality of treatment established by Council Regulation (EEC) No 1612/68 shall apply also to persons coming under the provisions of this regulation.'

55. In the light of the above, the obvious course open to the applicant is to rely on Article 7 of Regulation No 1612/68 or on Regulation No 1251/70 either in his own name or on behalf of his daughter. Whilst the Court did not state whether Regulation No 1612/68 applied in *Mr & Mrs F.*, [36] it specified in *Inzirillo*, [37] after stating its position with respect to Regulation No 1408/71, that:

'Furthermore the obligation to ensure that a handicapped adult child receives treatment equal to that accorded to the nationals of the State in which he resides is laid down in other provisions of Community law relating to freedom of movement for workers. Article 10(1)(a) of Regulation No 1612/68 of the Council of 19 October 1968 (...) provides that the right to install oneself in a Member State with a worker who is employed there although a national of another Member State applies not only to those descendants of such a worker who are under the age of 21 years but also to those who are "dependants". Article 7(2) of the same regulation provides that a worker who is a national of a Member State shall, in the territory of another Member State, enjoy "the same social and tax advantages as national workers". In the light of the equality of treatment which Regulation No 1612/68 seeks to bring about and taking account of the provisions of that regulation as a whole, the matters covered by Article 7(2) must be defined in such a way as to include every social and tax advantage, whether or not linked to a contract of employment, such as an allowance for handicapped adults which is awarded by a Member State to its own nationals under legislation which gives a legally protected right thereto.' [38]

56. The applicant could hence claim the benefits applied for under Community law if they represented social advantages for him and if his daughter could rely on the principle of equal treatment. It is questionable whether those conditions apply, since disability allowances are granted on the basis of

35 — Regulation No 1251/70 of the Commission of 29 June 1970 on the right of workers to remain in the territory of a Member State after having been employed in that State, OJ, English Special Edition 1970 (II), p. 402.

36 — Case C-7/75, cited above, footnote 16.

37 — Case C-63/76, cited above, footnote 16.

38 — Case C-63/76, cited above, footnote 16, paras 18 to 21.

personal entitlement and it might depend on whether the members of the family of a worker are directly or only indirectly entitled to equality of treatment.

57. The Court has consistently held, in defining social advantages within the meaning of Article 7(2) of Regulation No 1612/68, that:

'it follows from that regulation as a whole and from the objective pursued that the advantages which that regulation extends to workers who are nationals of other Member States are all those which, whether or not linked to a contract of employment, are generally granted to national workers primarily because of their objective status as workers or by virtue of the mere fact of their residence on the national territory and whose extension to workers who are nationals of other Member States therefore seems likely to facilitate the mobility of such workers within the Community.' [39]

58. Admittedly the disability allowances applied for would be granted not to the applicant but to his daughter. The members of the family of a migrant worker and also the adult children of the worker who are dependent on him are, however, expressly identified as coming under the regulation. [40]

59. Following the judgment in *Lebon* [41] the members of a worker's family qualify only indirect beneficiaries of equal treatment. Nevertheless, even this ruling denies adult members of a worker's family the opportunity to rely on Article 7(2) to obtain the minimum means of subsistence only in so far as they are *no longer* dependent on the worker.

60. The actual circumstances in the case before the national court are, however, different. The applicant still supports his daughter. That situation will essentially remain the same, since the daughter is not in a position to pursue gainful employment. In the case before the national court the financial dependence of a child upon its parents, which is normally limited in time, is prolonged as a result of the daughter's disability.

61. As the Court held in *Lebon*, [42] this matter turns solely on the actual support provided by the worker; there is no requirement for the worker to be obliged to support the child. As a result public benefits in favour of the daughter will always constitute a social advantage for her father who is supporting her. [43]

62. The situation is not altered by the fact that the daughter spends part of her time in a

39 — Cf. Case C-249/83 *Hoeckx*, cited above, footnote 11, para. 20 and Case C-122/84 *Scrivener*, cited above, footnote 11, para. 24.

40 — Cf. Article 10(1)(a) of Regulation No 1612/68.

41 — Case C-316/85 *CPAS de Courcelles* v *Lebon* [1987] ECR 2811, para. 12.

42 — Case C-316/85, cited above, footnote 41.

43 — Cf. Case C-3/90 *Bernini* v *Dutch Minister for Education and Science* [1992] ECR I-1071, para. 22 et seq.

subsidized rehabilitation centre. On the one hand this fact is, apparently, already taken into account in the Member State's provisions on the payment of benefits. On the other hand, the fact that the daughter is receiving benefit in another form, would have negative repercussions for the applicant only if all the allowances in support of the child came from a source other than the applicant, which is, however, very unlikely.

63. Finally the question that remains is whether the applicant's daughter can rely directly on the principle of equality of treatment or whether only the father can do so on behalf of the members of his family.

64. First of all, the idea that only the worker may directly invoke the prohibition on discrimination, is borne out by the judgment in *Lebon* [44] which seems to suggest that members of the family are only indirect beneficiaries, a view which might also be regarded as confirmed by *Taghavi*. [45] In *Taghavi*, however, the claimant was a national of a non-member country and the circumstances were, on these grounds alone, not comparable.

65. The judgment in *Lebon*, too, provides no indication of what the consequences would be if the question whether certain public benefits granted to members of a worker's family constitute a social advantage for the worker were answered in the affirmative.

66. By contrast, the Court expressly held in *Inzirillo* [46] that a handicapped child should receive equal treatment. Moreover, in *Bernini*, [47] the Court took the view that a member of a worker's family could, under the conditions described, rely *directly* on Article 7(2) of Regulation No 1612/68 to make a claim *in his own right*.

67. In my opinion a beneficiary must, under these circumstances, also be able to rely on the principle of equal treatment *in his own right*. [48] If all the requirements which justify a claim must be met by the member of a worker's family, this person must also enjoy equal treatment if the object of the principle of equal treatment is not to be defeated.

68. That interpretation is, moreover, supported by the wording of Article 7 of Regulation No 1251/70, which makes no distinction between workers and other persons covered by the regulation, but simply refers to persons coming under the provisions of the regulations.

44 — Case C-316/85, cited above, footnote 41.

45 — Case C-243/91, cited above, footnote 33, para. 11.

46 — Case C-63/76, cited above, footnote 16, para. 18.

47 — Case C-3/90, cited above, footnote 43, para. 26.

48 — Cf. the Opinion of Advocate General Jacobs in Case C-111/91 *Commission* v *Luxembourg* [1993] ECR I-817, at p. I-818, point 33.

69. Because the daughter of the applicant was denied the benefits applied for on the ground of her nationality, she was the victim of direct discrimination. But even if the applicant's father was taken as the person of reference, the nationality requirement would at least constitute indirect discrimination, since the children of migrant workers are much more frequently foreign nationals than the members of national workers' familiies.

70. As a result the applicant will be able to rely successfully on the principle of equal treatment as defined in Regulation No 1612/68 and 1251/70 on behalf of his daughter.

C — Conclusion

71. In the light of the foregoing I propose that the Court answer the questions submitted for a preliminary ruling as follows:

(1) Articles 2 and 3 of Regulation No 1408/71 are to be interpreted as meaning that they cannot be relied on by a disabled person to claim disability allowances as a right in person, if neither she nor her father, who confers her social status upon her, was a member of one of the social security schemes which Regulation No 1408/71 is intended to coordinate.

(2) She can, however, as the daughter of a migrant worker, rely on Article 7(2) of Regulation No 1612/68 in her own right in order to obtain benefit as long as she is still being supported by the migrant worker and these allowances thus constitute a social advantage for him.