OPINION OF ADVOCATE GENERAL ALBER

delivered on 26 October 2000 [1]

I — Introduction

1. The reference for a preliminary ruling made by the Lapin lääninoikeus, a Finnish administrative court, raises questions on the interpretation of Articles 28a and 33(2) of Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, [2] in particular the question whether a Swedish national residing in Finland who actually receives pension benefits only from Sweden is liable to pay contributions in Finland. Finland justifies the alleged obligation to pay State pension and sickness insurance contributions by reference to the person's residence in the Finnish State.

1 — Original language: German.

2 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 in the version relevant to the present dispute — consolidated version (OJ 1992 C 325, p. 1).

II — Facts

2. Sulo David Rundgren, the claimant in the main proceedings (hereinafter 'the claimant'), who has been a Swedish national since 1975, moved from Sweden to Finland on 29 September 1989. From 1991 to 1996 he received from Sweden a State pension and an old-age pension based on his work in the civil service and a life annuity following an accident at work. From 1994 to 1996 he had no income other than the pensions paid by Sweden.

3. In Finland the claimant was declared liable to pay State pension contributions of FIM 2 299.20 and sickness insurance contributions of FIM 4 611.21 in respect of the tax assessment for 1994, State pension contributions of FIM 1 279.01 and sickness insurance contributions of FIM 4 091.15 in respect of 1995, and

sickness insurance contributions of FIM 4 465.40 in respect of 1996.

— Because of the pension and the life annuity which he receives from Sweden, he is not entitled to receive a pension in Finland either.

4. The claimant had applied to the competent appeals board (Verotuksen Oikaisulautakunta) for exemption from liability to pay State pension and sickness insurance contributions for the period from 1991 to 1996. The application was rejected on the ground that a pensioner residing in Finland is not required to pay sickness insurance contributions under Regulation No 1408/71 if he is not entitled to any pension in Finland. This must be proven by a certificate from the social insurance institution. The claimant produced a certificate showing that he had neither applied for nor received a State pension in Finland; he did not prove, however, that he was not entitled to any pension from Finland. The abovementioned regulation was therefore not applicable.

— Sweden is responsible in principle for all benefits to which the claimant is entitled. Finland may, if it so wishes, demand reimbursement from Sweden of any costs incurred by it.

5. The claimant appealed against that decision. He based his appeal *inter alia* on the following grounds:

— Since he does not receive any taxable income in Finland and does not therefore pay any income tax there, he cannot be required to pay any parafiscal contributions either.

— At the time when he resided in Sweden, he paid all relevant contributions for the financing of pension and sickness insurance schemes, the purpose of which was to cover social security protection following his retirement. According to his own statement, the claimant also pays State pension and sickness insurance contributions in Sweden, which form part of Swedish tax at provincial level. If he is liable to pay contributions in Finland, he is subject to double taxation. A person residing in Sweden who receives a pension and a life annuity from Finland does not have to pay any corresponding contributions in Sweden. He is thus the object of prohibited discrimination.

III — Applicable legislation

(1) *Community legislation*

Regulation (EEC) No 1408/71 of the Council 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 (hereinafter 'the regulation')

6. Article 13(2)(f) states:

'2. Subject to Articles 14 to 17:

...

(f) a person to whom the legislation of a Member State ceases to be applicable, without the legislation of another Member State becoming applicable to him in accordance with one of the rules laid down in the aforegoing subparagraphs or in accordance with one of the exceptions or special provisions laid down in Articles 14 to 17 shall be subject to the legislation of the Member State in whose territory he resides in accordance with the provisions of that legislation alone.'

7. Article 28a reads as follows:

'Where the pensioner entitled to a pension under the legislation of one Member State, or to pensions under the legislations of two or more Member States, resides in the territory of a Member State under whose legislation the right to receive benefits in kind is not subject to conditions of insurance or employment, *nor is any pension payable*,[3] the cost of benefits in kind provided to him and to members of his family shall be borne by the institution of one of the Member States competent in respect of pensions, determined according to the rules laid down in Article 28(2), to the extent that the pensioner and members of his family would have been entitled to such benefits under the legislation administered by the said institutions if they resided in the territory of the Member State where that institution is situated.'

8. Article 33 states:

'1. The institution of a Member State which is responsible for payment of a

3 — This expression emphasised by the author will be returned to several times below.

pension and which administers legislation providing for deductions from pensions in respect of contributions for sickness and maternity shall be authorised to make such deductions, calculated in accordance with the legislation concerned, from the pension payable by such institution, to the extent that the cost of the benefits under Articles 27, 28, 28a, 29, 31 and 32 is to be borne by an institution of the said Member State.

2. Where, in the cases referred to in Article 28a, the acquisition of benefits in respect of sickness and maternity is subject to the payment of contributions or similar payments under the legislation of a Member State in whose territory the pensioner in question resides, by virtue of such residence, these contributions shall not be payable.'

9. Other relevant provisions of the regulation will be cited at the relevant points below for reasons of better clarity.

(2) *The national legislation*

10. Under Paragraph 1 of the Finnish State Pensions Law (Kansaneläkelaki), persons aged 16 years or over who are resident in Finland have old-age, invalidity and unemployment insurance under that Law. In accordance with Paragraph 4 of that Law, insured persons have to pay contributions calculated on the basis of the total income taken into account for taxes in respect of the preceding tax year.

11. Under Paragraph 1 of the Finnish Sickness Insurance Law (Sairausvakuutuslaki), all persons resident in Finland have sickness insurance under that Law. Sickness insurance contributions under Paragraph 33(2) of that Law are calculated on the basis of the total income taken into account for taxes in respect of the preceding tax year.

12. Under Paragraph 1(2) of the Law of 30 December 1993 on the application of statutory social security provisions on the basis of residence (1573/93), it must be determined whether a person is to be regarded as residing in Finland for the purposes of the application of statutory social security provisions, unless an international convention by which Finland is bound provides otherwise.

13. Under Article 6(1) of the Nordic Convention on Social Security (hereinafter 'the Convention'), a person residing in a Nordic State is subject to the legislation of the State of residence, unless otherwise provided for in that Convention.

IV — The reference for a preliminary ruling

14. The referring court has quoted the observations of the bodies involved in the main proceedings, the tax inspector for the Municipality of Tornio, the State Pension Office (Kansaneläkelaitos), the Ministry of Social Affairs and Health and the Swedish institutions competent in respect of sickness benefits and State pensions. The referring court takes the view that the present case primarily turns on whether Community law precludes the application of the Finnish legislation under which the claimant is required to pay State pension and sickness insurance contributions to the compulsory insurance scheme on the basis of his income from Sweden. It therefore makes a reference to the Court for a preliminary ruling on the following questions:

V — The questions

'1. Is the EC Treaty or Regulation (EEC) No 1408/71 on social security or Regulation (EEC) No 1612/68 on freedom of movement for workers within the Community applicable in the situation at issue, Mr Rundgren having changed residence from Sweden to Finland on 29 September 1989, that is, before the Agreement on the European Economic Area entered into force with respect to Finland?

2. If the answer to Question 1 is affirmative, is the expression "nor is any pension payable" in Article 28a of Regulation No 1408/71 then to be interpreted as covering a case in which:

(a) Mr Rundgren is not entitled to a State pension, or

(b) he is not entitled to a pension based on gainful employment, or

(c) does that expression cover only a case in which both point (a) and point (b) hold good for him at the same time?

In interpreting the aforementioned expression, is it also to be taken that entitlement to a pension means in this case Mr Rundgren's right in principle to a pension in Finland, in which case no account is taken of his actual circumstances, such as the effect on the acquisition of a pension in Finland of the pension and annuity income received by him from Sweden, or does

the expression refer to the specific circumstances, in which case the effect of the income received by him from Sweden on the acquisition of a pension in Finland is taken into account?

3. Do the contributions and similar payments referred to in Article 33(2) of Regulation (EEC) No 1408/71 include, besides contributions charged for the receipt of social security in respect of sickness and maternity (in Finland, sickness insurance contributions), also contributions charged in respect of old age, invalidity and unemployment (in Finland, State pension insurance contributions)? If the answer to that question is negative, is it possible that the latter contributions are precluded under some other article of the regulation, regard being had in particular to the scope of the regulation apparent from Article 4(1)(b), (c) and (g) thereof?

4. What effect, in the interpretation of Articles 28a and 33(2) of Regulation (EEC) No 1408/71, does the fact have that Finland and Sweden have agreed, together with the other Nordic States, in accordance with Article 36(3) of the said regulation and Article 23 of the Nordic Social Security Convention, to waive *inter alia* all reimbursement of the costs of care?

5. If Articles 28a and 33(2) of the aforesaid regulation apply so that Mr Rundgren may be charged State pension and sickness insurance contributions in Finland, may he nevertheless apply under Article 17a of the regulation retrospectively to be exempted from the scope of the legislation of his State of residence, Finland, or must the application have been made before determination of his contribution obligations under Finnish legislation? In the latter case, what importance does the fact have that Mr Rundgren was possibly not aware of the possibility given by Article 17a of the regulation?

6. Are Article 48 of the EC Treaty (now Article 39 EC) and in particular Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community to be interpreted as meaning that Finland is not entitled in the present case to charge Mr Rundgren State pension insurance contributions and sickness insurance contributions in accordance with its own national legislation?

7. Is Article 3 of Regulation (EEC) No 1408/71 or Article 6 of the EC Treaty (now Article 12 EC) to be interpreted as meaning that Mr Rundgren has in the present case become the object of prohibited discrimination?

8. May Mr Rundgren rely directly on the EC Treaty or on other Community law

on the ground that he has possibly had to pay contributions of a tax nature on the same basis both to Finland and to Sweden as a result of the different methods adopted by Finland and Sweden in financing social security schemes?'

VI — Observations of the parties

15. The Finnish Government and the Commission participated in the proceedings. In response to questions asked by the Court, the Swedish Government also submitted a document to answer those questions.

(1) *The Finnish Government*

16. With regard to the national legislation, the Finnish Government first states in general terms that the social security scheme is essentially based on residence in Finland. A person residing in Finland is insured automatically by the Law. The insured person participates in the financing of the scheme through contributions. These are levied in the form of a parafiscal contribution. The insured person's entitlement to benefits is not contingent on contributions paid. Any person aged 16 years or over who resides in Finland has old-age, invalidity and unemployment insurance by law. Entitlement to a State pension is acquired through a period of residence of at least three years after attaining the age of 16. The State pension is calculated on the basis of the length of periods of residence in Finland. It is intended to guarantee a minimum income for persons who receive only a small pension or no pension at all on the basis of their gainful employment. The other pensions are therefore deducted in calculating the State pension. If the pensions exceed a certain ceiling, the State pension ceases to be payable.

17. The Nordic Convention on Social Security is a convention within the meaning of Article 8 of Regulation No 1408/71.[4] That Convention is applicable to persons who are not covered by the scope of Regulation No 1408/71, such as nationals of third states or those not in gainful employment. Under that Convention, the recipient of a pension who has ceased all professional activity is covered by the legislation of the State in which he resides. Under the Convention, the Nordic States agreed, moreover, reciprocally to waive reimbursement of the costs of benefits in kind within the meaning of Article 36 of Regulation No 1408/71.

4 — The provision states:
'1. Two or more Member States may, as need arises, conclude conventions with each other based on the principles and in the spirit of this Regulation.
2. Each Member State shall notify, in accordance with the provisions of Article 97(1), any convention concluded with another Member State under the provisions of paragraph 1.'

18. As far as the Swedish legal order is concerned, it is also assumed that entitlement to sickness benefits is dependent on residence in the Member State. The Swedish legal order does not make such entitlement dependent on either contributions paid, the exercise of a professional activity or the receipt of a pension. Entitlement to benefits ceases if the person leaves Sweden. No social security contributions are due in respect of a pension.

19. Irrespective of whether Regulation No 1408/71, and in particular Article 13(2)(f) thereof, or the Nordic Convention on Social Security is applied, Finland is competent in respect of a recipient of a pension in the claimant's position.

20. As far as specific answers to the individual questions referred for a preliminary ruling are concerned, the Finnish Governments makes the following observations:

The first question

21. Regulation No 1408/71 has been applicable to Finland and Sweden since their accession to the European Economic Area at the beginning of 1994. The personal scope of the regulation is laid down in Article 2.[5] The Court's case-law places recipients of pensions on a equal footing with employed persons. It is therefore not impossible that the regulation may be applicable to the present case. On the other hand, Regulation (EEC) No 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community[6] seeks to regulate the situation of migrant workers. Such a situation does not exist in the case at issue. Therefore, Regulation No 1612/68 is not applicable to the present case.

The second question

22. With the second question, the referring court seeks to ascertain whether the expression 'nor is any pension payable' in Article 28a means any type of pension, including pensions based on gainful employment and the State pension under Finnish law, and whether it is an abstract legal status in respect of a pension or a specific pension entitlement. The Finnish Government takes the view that this question can be answered only in the overall context of Section 5 of Regulation No 1408/71. The objective of the combined effect of Articles 28a and 33 is to prevent situations where a recipient of a pension is required to pay contributions

5 — Article 2(1) states:
'1. This Regulation shall apply to employed or self-employed persons who are or have been subject to the legislation of one or more Member States and who are nationals of one of the Member States...'.

6 — OJ, English Special Edition 1968 (II), p. 475.

even though he has already acquired an entitlement to sickness benefits in another Member State. In the view of the Finnish Government, such a situation does not exist in the present case. In the light of the objective of the provisions, an entitlement 'in principle' to a pension must be regarded as a payable pension within the meaning of the provision. It is consequently not dependent on whether a pension is actually paid. The claimant's situation in the main proceedings is therefore governed by Article 27[7] of Regulation No 1408/71. Under those circumstances, Articles 28a and 33(2) cannot preclude the obligation to pay contributions provided for in the Finnish legislation.

The third question

23. Article 33(2) of Regulation No 1408/71 relates only to benefits in respect of sickness and maternity and the associated contributions. The regulation does not therefore lay down any provisions which relate to State pension contributions and restrict levying of those contributions. Such parafiscal contributions are not connected with the entitlement to a pension. The State pension contributions cannot therefore be regarded as contributions within the meaning of Article 33(2) of Regulation No 1408/71.

7 — Article 27 states:
'A pensioner who is entitled to draw pensions under the legislation of two or more Member States, of which one is that of the Member State in whose territory he resides, and who is entitled to benefits under the legislation of the latter Member State ... shall, with the members of his family, receive such benefits from the institution of the place of residence and at the expense of that institution as though the person concerned were a pensioner whose pension was payable solely under the legislation of the latter Member State.'

The fourth question

24. The Finnish Government points out that the Nordic Convention on Social Security was concluded at the same time as Regulation No 1408/71 took effect. The provisions were necessary since the regulation did not take sufficient account of situations where entitlement to benefits in kind in the event of sickness is not contingent on the receipt of a pension. It follows that the provisions of the Nordic Convention on Social Security do not conflict with Articles 28a and 33(2) of the regulation.

The fifth question

25. In answer to the fifth question, the Finnish Government points out that Article 17a[8] lays down an exception to the rule set out in Article 13(2)(f). In certain cases, the recipient of a pension may choose between the legal order of the State in which he resides and the State in which he works. With reference to the objective and the historical background of the provision, the Finnish Government observes that Article 17a is applicable only in cases where the Member State which is responsible for payment of the pension is also liable for sickness and maternity benefits. This is not the case in the present dispute.

8 — See point 72 below.

Sickness benefits are payable solely under the Finnish legal order.

The sixth, seventh and eighth questions

26. The Finnish Government assumes that, with the three questions, the referring court wishes to ascertain whether the levying of contributions infringes any rule of Community law. The Finnish Government takes the view that there is no discernible infringement. The fact that different States apply different legal orders does not in itself constitute discrimination. On that assumption, the claimant's situation cannot be compared with that of someone residing in Sweden either. Rather, he is treated in the same way as any other person residing in Finland, irrespective of his nationality and the sources of his income. The levying of contributions is not therefore contrary to the prohibition of discrimination enshrined in Community law.

(2) *The Commission*

27. With regard to the answer to the first question, the Commission takes the view that the claimant is in a situation to which the provisions of Regulation No 1408/71 are applicable. On the other hand, Regulation No 1612/68 is not applicable under the specific circumstances of the present case.

The second, third and sixth questions

28. The second, third and sixth questions, on which the Commission submits combined observations, are closely interrelated in the view of the Commission. Ultimately, it is necessary to clarify whether Regulation No 1408/71 precludes the levying of sickness insurance and State pension contributions. It must be concluded that the provisions of Title II of Regulation No 1408/71 constitute a self-contained system of conflict of law rules for determining the applicable legal order. Consequently, under Article 13(2)(f) the claimant falls within the scope of the Finnish legislation. An essential distinction must be drawn between this question and the question whether the claimant must also pay social security contributions in Finland in respect of his Swedish pension. Under Articles 28a and 28(2) [9] of the regulation, Sweden is the competent State in respect of the award of the pension.

29. The Finnish authorities would claim that the entitlement in principle to a State

9 — Article 28(2) states:
'In the cases covered by paragraph 1, the cost of benefits in kind shall be borne by the institution as determined according to the following rules:
(a) where the pensioner is entitled to the said benefits under the legislation of a single Member State, the cost shall be borne by the competent institution of that State;
(b) where the pensioner is entitled to the said benefits under the legislations of two or more Member States, the cost thereof shall be borne by the competent institution of the Member State to whose legislation the pensioner has been subject for the longest period of time; should the application of this rule result in several institutions being responsible for the cost of benefits the cost shall be borne by the institution administering the legislation to which the pensioner was last subject.'

pension which is based on residence in Finland should be regarded as an entitlement to a pension within the meaning of Article 28a, with the result that it is no longer relevant whether a pension is actually paid. The Commission attributes this view to the wording of Article 28a of the regulation in the Finnish version, which can be translated literally as 'there is no entitlement to a pension or annuity'. [10] A comparison of the other language versions of Regulation No 1408/71 suggests, however, that it refers to a specific entitlement to payment of a pension. This understanding of the provision is also consistent with its objective. Article 28a was incorporated into the regulation at a later date in order to prevent disproportionate burdens on a recipient of a pension who resides in a Member State in which the system of sickness benefits is based on residence.

30. If it is therefore assumed that no pension is payable to the claimant by Finland, the Swedish institution is then competent in respect of the costs of benefits in kind. In so far as the Swedish institution is competent, Finland may not require the claimant to pay sickness insurance contributions under Article 33(2). On the other hand, the rule does not make any express provision regarding State pension contributions. Nevertheless, the provisions contained therein must be seen as the expression of a general principle. [11] Any payment of contributions would not give the claimant entitlement to further benefits either. In the view of the Commission, the necessary contributions are contrary to Articles 48 and 51 of the EC Treaty (now, after amendment, Article 39 EC and 42 EC).

31. The Commission therefore suggests that the questions under consideration be answered as follows:

The second question

The expression 'nor is any pension payable' in Article 28a of Regulation No 1408/71 can only be interpreted as meaning that a pension is not payable in a situation where the beneficiary would be entitled in principle to a pension, but that entitlement is not realised by actual payment of that pension, for whatever reason.

The third and sixth questions

It is contrary to Articles 39 EC and 42 EC and to Article 33 of Regulation No 1408/71 to require those who receive a pension from another Member State, solely by reason of residence, to pay social security contributions on that pension in

10 — Eikä oikeutta eläkkeeseen ole.

11 — See Case C-140/88 *Noij* [1991] ECR I-387.

respect of sickness and maternity and in order to provide coverage for old-age, unemployment and invalidity in the Member State in question if that Member State does not grant a pension either.

The fourth question

In the view of the Commission an agreement by two Member States to reciprocally waive reimbursement pursuant to Article 36(3) of Regulation No 1408/71 has absolutely no legal effects on the relationship between the competent institution of a Member State and the insured person. It affects only the relationship between the Member States themselves.

The fifth question

The Commission takes the view that the levying of social security contributions on the Swedish pension is contrary to Community law. It is therefore ultimately irrelevant under what conditions an application for exemption under Article 17a of the regulation must be made. In the event that the Court arrives at a different assessment, the Commission points out that it is ultimately for the national court to decide whether an application may be made retrospectively. In any case, it is helpful if a Member State lays down an administrative procedure, of whatever nature, for example by making provision for a form.

The seventh and eighth question

The Commission cannot discern any prohibited discrimination in the legal situation which is at issue in the present case.

VII — Assessment

(1) *The first question*

32. The first question asked by the referring court is above all a question regarding the material and personal scope of Regulation No 1408/71 in relation to situations like that in the main proceedings which might depend on events which took place before the entry into force of Regulation No 1408/71 in Finland, that is to say before Finland's accession to the European Community.

33. Under Article 2 of the Act of Accession for Austria, Finland and Sweden, the new Member States are bound directly by the Treaty by virtue of accession, [12] that is to say from 1 January 1995 at the latest. This also applies, in so far as no express transitional provisions are laid down, to secondary Community law. However, the acceding States had in fact been bound by Regulation No 1408/71 since 1 January 1994 by virtue of accession to the European Economic Area. [13]

34. The material scope of the regulation is governed in Article 4. [14] Thereunder, the regulation applies to all legislation concerning branches of social security which relate to one of the listed types of benefit. The present case involves both sickness benefits and old-age benefits, as well as benefits in respect of accidents at work and occupational diseases. Since, under Article 4(2), the regulation applies to all general and special social security schemes, whether contributory or non-contributory, there can be no doubt as to the material scope of the regulation in relation to a situation such as that in the present case.

35. The personal scope of the regulation is governed by Article 2. [15] Under Article 2(1), the regulation applies first and foremost 'to employed or self-employed persons who are or have been subject to the legislation of one or more Member States'. The same applies under Article 2(3) to 'civil servants and to persons who, in accordance with the legislation applicable, are treated as such'. As a former civil servant in Sweden, the claimant therefore potentially falls within the scope of the regulation. With regard to the question whether events which occurred before the entry into force of the regulation might have to be taken into consideration, reference must be made to the transitional provisions of Article 94 of the regulation. [16]

12 — The provision states: 'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act'.

13 — See OJ, English Special Edition 1971 (II), p. 416.

14 — Article 4(1) and (2) state:
'1. This Regulation shall apply to all legislation concerning the following branches of social security:
(a) sickness and maternity benefits;
(b) invalidity benefits, including those intended for the maintenance or improvement of earning capacity;
(c) old-age benefits;
(d) survivor's benefits;
(e) benefits in respect of accidents at work and occupational diseases;
(f) death grants;
(g) unemployment benefits;
(h) family benefits.
2. This Regulation shall apply to all general and special social security schemes, whether contributory or non-contributory, and to schemes concerning the liability of an employer or shipowner in respect of the benefits referred to in paragraph 1.'

15 — See footnote 5 above.

16 — Article 94(2) and (3) reads as follows:
'2. All periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before 1 October 1972 or before the date of its application in the territory of that Member State or in a part of the territory of that State shall be taken into consideration for the determination of rights acquired under the provisions of this Regulation.
3. Subject to the provisions of paragraph 1, a right shall be acquired under this Regulation even though it relates to a contingency which materialised prior to 1 October 1972 or to the date of its application in the territory of the Member State concerned or in a part of the territory of that State.'

36. In this regard, the Court stated in *Kuusijärvi*: [17]

'Article 94(3) of Regulation No 1408/71 expressly provides that a right is to be acquired under that regulation even though it relates to a contingency which materialised prior to the date of application of that regulation in the territory of the Member State concerned.

Similarly, Article 94(2) of Regulation No 1408/71 provides that all periods of insurance and, where appropriate, all periods of employment or residence completed under the legislation of a Member State before the date of its application in the territory of that Member State are to be taken into consideration for the determination of rights acquired under the provisions of the regulation.'

37. When the claimant moved to Finland in 1989, he was already in receipt of a pension. He was therefore no longer in an active employment relationship. On the one hand, the wording of Article 2 of the regulation makes express reference also to the past ('have been subject'). On the other hand, it can be inferred from the Court's case-law [18] that the legal status of a recipient of a pension within the meaning of the regulation is to be treated in the same way as that of an employed person for the purposes of the regulation.

38. In the judgment in *Pierik*, for example, the Court stated:

'Article 1(a) of Regulation No 1408/71 defines the concept of "worker" as any person who is compulsorily or voluntarily insured under one of the social security schemes referred to in subparagraphs (i), (ii) or (iii) of that provision. Laid down "for the purpose of this regulation", such a definition has a general scope, and in the light of that consideration covers any person who has the capacity of a person insured under the social security legislation of one or more Member States, whether or not he pursues a professional or trade activity. It follows that, even if they do not pursue a professional or trade activity, pensioners entitled to draw pensions under the legislation of one or more Member States come within the provisions of the regulation concerning "workers" by virtue of their insurance under a social security

17 — Case C-275/96 *Kuusijärvi* [1998] ECR I-3419, paragraphs 24 and 25.

18 — Case 182/78 *Pierik* [1979] ECR 1977 and Case C-57/90 *Commission* v *France* [1992] ECR I-75.

scheme, unless they are subject to special provisions laid down regarding them.' [19]

39. In the judgment in *Commission* v *France*, the Court further stated 'that recipients of an early retirement or supplementary pension are employed persons within the meaning of Article 1(a) of Regulation No 1408/71 and that they fall within the class of persons covered by the regulation, as described in Article 2 thereof'. [20]

40. Furthermore, the Court ruled in *Walsh* [21] that the definition of the personal scope of the regulation cannot depend on whether the beneficiary is still bound to pay contributions.

41. The first part of the first question should therefore be answered to the effect that Regulation No 1408/71 is applicable to a person who was first gainfully employed in a Member State and became a recipient of a pension there, then settled in another Member State before the entry into force of the regulation.

42. In so far as the points of law which are relevant to this dispute can be clarified by reference to Regulation No 1408/71, it would not be relevant whether Regulation No 1612/68 on freedom of movement for workers within the Community was applicable in the present case. Nevertheless, note should be taken of the differing scopes of Regulations No 1612/68 and No 1408/71. Even the definition of the notion of employed person/worker to be applied in the two regulations is different. Regulation No 1612/68 is directed primarily at employed persons and members of their family who are in an active employment relationship. Their right to remain after having been employed and their associated rights are governed by Regulation (EEC) No 1251/70 on the right of workers to remain in the territory of a Member State after having been employed in that State, [22] and the Directive on the right of residence for employees and self-employed persons who have ceased their occupational activity. [23]

43. It is therefore rather unlikely that Regulation No 1612/68 is applicable. That regulation might at most be of interest with respect to the applicability of the prohibi-

19 — Case 192/78 *Pierik* (cited in footnote 18, paragraph 4).

20 — Case C-57/90 *Commission* v *France*, cited in footnote 18, paragraph 11.

21 — Case 143/79 *Walsh* [1980] ECR 1639, paragraph 6.

22 — Regulation (EEC) No 1251/70 of the Commission of 29 June 1970 (OJ, English Special Edition 1970 (II), p. 402).

23 — Council Directive 90/365/EEC of 28 June 1990 (OJ 1990 L 180, p. 28).

tion of discrimination laid down in the regulation. However, it will not be absolutely necessary to clarify definitively, in the context of the approach taken here, whether Regulation No 1612/68 is applicable to a case like the present one. The answer to the first question must therefore be that both the Treaty establishing the European Community and Regulation No 1408/71 are applicable to a case like the present one.

(2) *The second question*

44. The referring court seeks to ascertain how the expression 'nor is any pension payable' in Article 28a of the regulation is to be construed, whether 'pension' within the meaning of the provision can be a Finnish State pension or only a pension based on gainful employment and, lastly, whether a 'payable pension' can also be the 'right in principle to a pension in Finland' or only an entitlement to a pension which is actually paid under specific circumstances.

45. The Commission's comment regarding the substantive differences between the different language versions of the regulation is very informative as the starting point for the reasoning. The Finnish version of the regulation states 'eikä oikeutta eläkkeeseen ole', which, literally translated, means 'absolutely no entitlement to a pension (exists)'.[24] That wording explains the interpretation of the provision given by the Finnish authorities. Other language versions of the regulation, however, suggest a different understanding.

46. The French version states 'aucune rente ou pension n'est due' and the English version 'nor is any pension payable'. Here the emphasis is on the actual payment of the pension. This wording therefore suggests that the phrase 'nor is any pension payable' refers to entitlement to actual payment of a pension. An abstract entitlement to a State pension which is enjoyed by any resident who has lived in the territory of the Member State for at least three years, but which is not realised on account of other income drawn by the person, particularly in the form of pension payments based on gainful employment, would not be a 'payable pension' within the meaning of the provision.

47. This interpretation — as the Commission rightly points out — is supported by

24 — The expression was translated into French by the translators of the pleadings as follows: 'il n'existe pas de droit à pension' and 'il n'y a pas de droit à une pension ou une rente'.

the legal definitions of the terms 'legislation', 'benefits' and 'pensions' in Article 1(j) and (t) of the regulation. Article 1(t) places the emphasis on payable contributions. [25]

48. Article 28a can be found in Chapter 1, 'Sickness and maternity', of Title III, which is headed 'Special provisions relating to the various categories of benefits'. Article 28 essentially governs the allocation of the obligation to pay benefits and the obligation to bear the costs of sickness benefits in the case of pensioners and members of their families who are entitled to payment of one or more pensions under the legislation of one or more Member States in whose territory they do not reside. Article 28a contains in this regard a specific rule subsequently introduced to cover cases where, irrespective of periods of insurance or employment, a right to receive benefits in kind exists under the legislation of the country of residence. In order to avoid disproportionate burdens on the institution of that Member State, it was established that the institution of the Member State competent in respect of the pension was required to bear the costs. Both the substantive context of the provision and its objective suggest a specific entitlement to a pension.

49. In the event that a specific entitlement to a pension existed, it would not be important either whether it is an entitlement to a pension solely based on gainful employment or an entitlement to a State pension, but under Article 4 of the regulation 'general and special social security schemes, whether contributory or non-contributory' fall within the material scope of the regulation. Furthermore, under Title III in Chapter 3, which lays down rules governing old-age benefits, the regulation also mentions 'minimum benefits'. [26] It can be inferred from the Court's case-law that these are benefits which are provided for in the legal orders of several Member States. [27] The conditions and the substance of the benefits are laid down in the relevant national provisions. A characteristic of such 'minimum benefits' within the meaning of Article 50 [28] of the regulation is that — according to the Court — they are designed 'to guarantee to recipients of retirement pensions a minimum income in excess of the amount to which they would normally be entitled on the basis of the periods of insurance completed by them and the contributions which they have paid. The purpose of such provisions is, in

25 — Article 1(t) states: '"benefits" and "pensions" mean all benefits and pensions, including all elements thereof payable out of public funds, revalorisation increases and supplementary allowances, subject to the provisions of Title III, as also lump-sum benefits which may be paid in lieu of pensions, and payments made by way of reimbursement of contributions'.

26 — See Article 50 of the regulation.

27 — Case 22/81 *Browning* [1981] ECR 3357, paragraph 11.

28 — That article states:
'A recipient of benefits to whom this Chapter applies may not, in the State in whose territory he resides and under whose legislation a benefit is payable to him, be awarded a benefit which is less than the minimum benefit ...'.

general, to provide the recipients with a guaranteed minimum income'.[29] It therefore appears certain that an old-age pension such as the State pension should be regarded as a pension within the meaning of Chapter 1 of Title III of the regulation.

50. In addition, it is also necessary to examine possible reasons why a pension is not paid in the country of residence and whether this might be able to affect the outcome. There may be both procedural and substantive reasons why an entitlement to a pension established in abstract terms in the legal order is not realised. Thus, from a procedural point of view, an entitlement may be frustrated merely because no application was made. The Finnish Government has pointed out, for example, that the claimant did not make an application, with the result that he cannot prove that he is entitled to a pension. In substantive terms, an entitlement to a pension may not be realised, for example, because — as in the present case — allowance must be made for other income in order to calculate the pension potentially payable.

51. Since the claimant in the main proceedings — as has been officially confirmed[30] — is not entitled to a State pension on account of his other income, there is a substantive ground for disqualification from receipt of the pension. The procedural aspect of making an application — in order to result in a rejection — can then no longer be important.

52. Nevertheless, the following additional points should be made on this aspect, in case wider importance is attached to it:

In the case-law on family benefits there are parallels to the consequences of failure to make an application,[31] specifically with regard to the suspension of benefits from a Member State because of a parallel entitlement to family allowances in another Member State. In this connection, the Court stated that actual receipt of the benefits was the crucial factor,[32] irrespective of whether this might be frustrated because no application has been made.[33]

53. The answer to the second question must therefore be that the expression 'nor

29 — Case 22/81 *Browning* (cited in footnote 27, paragraph 11).

30 — This assertion can be inferred from page 2 of the order for reference.

31 — Case 191/83 *Salzano* [1984] ECR 3741, Case 153/84 *Ferraioli* [1986] ECR 1401, Case 24/88 *Georges* [1989] ECR 1905 and Case C-117/89 *Kracht* [1990] ECR I-2781.

32 — See, for example, Case 191/83 *Salzano* (cited in footnote 31, paragraph 11).

33 — Confirmed by the judgment in Case C-117/89 *Kracht* (cited in footnote 31).

is any pension payable' in Article 28a of Regulation No 1408/71 is to be interpreted as meaning that neither a State pension nor a pension based on gainful employment is payable. The assessment of the situation depends on the specific circumstances, that is to say the entitlement to a pension which is actually payable.

(3) *The third, sixth and eighth questions*

54. Question 3 should be seen against the background of the fact that this case is covered by Article 28a of the regulation. Its legal consequences require the costs of benefits in kind to be borne by the institution of one of the Member States competent in respect of pensions (if and in so far as an entitlement exists, if the person resides in the territory of the Member State — by analogy to Article 28a of the regulation). In the present case, the Swedish institution would therefore be responsible for bearing the costs. For such a case Article 33(1) of the regulation provides that the institution is authorised to make deductions from pensions in respect of contributions to cover sickness and maternity benefits.

55. It can be inferred from the claimant's answer to the questions asked by the Court that the Swedish institution at least reimbursed the health care costs incurred for the years 1996 to 1999. As far as the material period (1994 to 1996) is concerned, moreover, it can inferred indirectly from the claimant's answer that no reimbursement took place for 1994 and 1995 because the 'annual allowance' was not exceeded. This can be seen from a letter from the Tornio pension fund which formed Annex 2 to the claimant's answer.

56. The answers given by the Swedish Government to the questions asked by the Court are relevant in several respects against the background of Article 33 of the regulation. First, the Swedish Government declares that the Swedish institution continues to be competent with respect to the costs incurred as a result of the claimant's occupational disease. The Swedish Government does not appear to assume a further-reaching obligation to reimburse, which can, however, be attributed to the general waiver of reimbursements of benefits in kind agreed between Sweden and Finland under Article 36(3) [34] of the regulation. This will be returned to in the answer to the fourth question. Secondly, the Swedish Government expressly declares that no social security contributions are levied in Sweden on the claimant's income. The claimant is not subject to municipal

34 — See point 69 below.

tax either. However, by virtue of his income from Sweden, the claimant is subject to a tax of 25% of taxable income levied at source. Such taxation applies to natural persons residing abroad. That tax replaces the taxes levied under the Swedish Law on municipal tax and the Law on income tax.

57. It is not possible to assess conclusively whether, by virtue of their replacement function, those taxes can at least also be regarded as contributions within the meaning of Article 33(1) of the regulation [35] without further information concerning the interaction between the taxes and contributions and the social security scheme.

58. In any case, the Member States' internal organisation of social security institutions and their financing cannot call into question the abstract obligations under Regulation No 1408/71. In the further examination of the matter, it must therefore be concluded that the main proceedings fall within the scope of Article 33(1).

59. Article 33(2) governs a further legal consequence of Article 28a. Where — by analogy to its wording [36] — in such cases the acquisition by a pensioner of benefits in respect of sickness and maternity in a Member State is subject to the payment of contributions or similar payments by virtue of his residence, these contributions are not payable.

60. The referring court evidently assumes that, if the scope of Article 28a of the regulation is opened up, it is necessary under Article 33(2) to refrain from levying contributions for sickness insurance in Finland and this does not otherwise raise any problems. This legal consequence follows, on the one hand, directly from the wording of Article 33(2) of the regulation. This view is supported by the Court's case-law, under which Article 33 of the regulation precludes the institution of a Member State responsible for payment of a pension from charging contributions to cover the sickness and maternity benefits payable by an institution of another Member State. [37] However, the situation of the State pension contributions levied for 1994 and 1995 is still unclear. The referring court therefore seeks to ascertain whether those State pension contributions are covered by the

35 — Especially since it can be inferred from the answers given by the Swedish Government that between 1993 and 1997 a proportion of the social security contributions were levied in the form of general contributions in the same way as income tax.

36 — For the wording of the provision see point 8 above.

37 — Case C-140/88 *Noij* (cited in footnote 11, paragraph 11).

notion of contribution under Article 33(2). In the event that they are not covered by the provision, the further question arises whether the levying of those contributions infringes another rule of Community law, whether it be Treaty law or secondary Community law. Therefore, Questions 6 and 8 should be dealt with in this context.

61. A broad interpretation of the terms 'contributions or similar payments' within the meaning of Article 33(2) of the regulation, which is not restricted to sickness insurance contributions, is suggested by the aim of the provision, which is connected with the general objective of the regulation, to contribute to the establishment of the fullest possible freedom of movement for migrant workers. [38]

In *Noij* the Court further stated:

'It would be contrary to that objective if, in the absence of grounds of general interest, a worker could be deprived of part of a pension received under the legislation of one Member State simply because he has gone to reside in another Member State'. [39]

62. The Court drew the following consequences from that assertion:

'It follows from the foregoing that the rules laid down by the aforesaid Article 33 concerning sickness or maternity benefits constitute the application of a *more general principle* according to which a pensioner cannot be required, because he resides in the territory of a Member State, to pay compulsory insurance contributions to cover benefits payable by an institution of another Member State'. [40]

63. This broad interpretation is perfectly capable of subsuming the contested State pension contributions for 1994 and 1995 under the terms 'contributions or similar payments'. With regard to such contributions to finance old-age, invalidity and unemployment schemes it is not possible to infer from Regulation No 1408/71 any more specific rules for a case such as forms the basis of Article 28a in conjunction with Article 33, with the result that a broad interpretation of Article 33(2) appears to be appropriate. This is also supported by the fact that the contributions in cases like

38 — See Case C-140/88 *Noij* (cited in footnote 11, paragraph 13).

39 — Case C-140/88 *Noij* (cited in footnote 11, paragraph 13).

40 — Case C-140/88 *Noij* (cited in footnote 11, paragraph 14, author's own emphasis).

that in the main proceedings do not correspond to any entitlement to a benefit.

64. The aspect of the interdependence of contributions and entitlement to benefits has already been highlighted by the Court in earlier judgments. For example, in the judgment in *Terhoeve*[41] the Court regarded as an infringement of Article 48 of the EC Treaty (now Article 39 EC) a rule 'levying, on a worker who has transferred his residence in the course of a year from one Member State to another in order to take up employment there, greater social security contributions than those which would be payable, in similar circumstances, by a worker who has continued to reside throughout the year in the Member State in question, *without the first worker also being entitled to additional social benefits*'.[42] In two Treaty infringement proceedings[43] brought against France, the Commission took action against the levying of the 'social debt repayment contributions'[44] and 'general social contributions'[45] in so far as the levying of contributions related to the employment income and substitute income obtained by employed and self-employed persons resident in France and taxable in that Member State in connection with employment in another Member State. Such persons were therefore covered by the social security scheme of the State of employment in accordance with Regulation No 1408/71. According to the Commission, the levying of contributions was also a double social levy contrary both to the regulation and to Articles 48 and 52 (now, after amendment, Article 43 EC) of the EC Treaty.[46] The Court found that there was both an infringement of Article 13 of Regulation No 1408/71 and an infringement of Articles 48 and 52 of the Treaty.

65. If these principles of case-law are applied to the present case, it can be concluded that the levying of contributions for State pensions which is contrary to Article 33(2) is also an infringement of Articles 48 and 52 of the Treaty. Both the provisions of Regulation No 1408/71 and the abovementioned Treaty provisions are directly applicable law, with the result that the individual may rely directly on those provisions.

66. Even if the Court were not to classify the State pension contributions as contributions or similar payments within the meaning of Article 33(2) of the regulation, the individual still has the option in any case to rely directly on the Treaty provisions. The fact that the State pension contributions have been described by the Finnish Government as parafiscal contributions does not preclude this view. It is undisputed that the levies are collected not as general taxes, but are designated for the

41 — Case C-18/95 *Terhoeve* [1999] ECR I-345.

42 — Case C-18/95 *Terhoeve* (cited in footnote 41, paragraph 42; author's own emphasis).

43 — Cases C-34/98 and C-169/98 *Commission* v *France* [2000] ECR I-995, I-1049.

44 — Contribution pour le remboursement de la dette sociale.

45 — Contribution sociale généralisée.

46 — Case C-34/98 *Commission* v *France* (cited in footnote 43, paragraphs 19 and 20) and Case C-169/98 *Commission* v *France* (cited in footnote 43, paragraphs 18 and 19).

financing of old-age, invalidity and unemployment schemes. Reference should also be made in this respect to the judgments in Cases C-34/98 [47] and C-169/98. [48]

67. The following answer should therefore be given to the third, sixth and eighth questions: Contributions which are levied in respect of old-age, invalidity and unemployment (State pension contributions) may, under the circumstances of the specific case, be subsumed under the terms 'contributions or similar payments' within the meaning of Article 33(2) of Regulation No 1408/71. In any case, however, they should be assessed on the basis of Articles 48 and 52 of the Treaty, which the levying of such contributions infringes in so far as the payment of contributions does not correspond to any entitlement to a benefit.

(4) *Fourth question*

68. By the fourth question, the referring court seeks to ascertain whether an agreement by the Member States in question reciprocally to waive reimbursement of costs of care has effects on the interpretation of the relevant provisions of the regulation.

69. Article 36 of the regulation, which governs reimbursement between institutions, provides as follows in paragraph 3:

'Two or more Member States, or the competent authorities of those States, may provide for other methods of reimbursement or may waive all reimbursement between institutions under their jurisdiction'.

70. The two Member States Finland and Sweden have availed themselves of that power under the Nordic Convention on Social Security and reciprocally waived reimbursement of the costs of benefits in kind. As has already been touched on in the answer to the third question, the fact that Member States avail themselves of the freedom which they are given to implement the provisions of Regulation No 1408/71 can have no effect on the original allocation of burdens and certainly not on the relationship between individuals and responsible institutions as it was intended and laid down by the regulation. The answer to the fourth question must therefore be as follows:

The interpretation of Articles 28a and 33(2) of Regulation No 1408/71 is not affected by the fact that the Member States

47 — Cited in footnote 43.
48 — Cited in footnote 43.

Finland and Sweden have availed themselves of the option provided for in Article 36(3) of the regulation by reciprocally waiving reimbursement of costs of care.

(5) *The fifth question*

71. By the fifth question, the referring court seeks to ascertain whether and, if appropriate, under what conditions exemption from the application of the legislation of the State of residence may be applied for in the event that an obligation to pay contributions should stem from the relevant provisions of Regulation No 1408/71. In accordance with the approach adopted here, an obligation to pay contributions to the Finnish social insurance scheme in a case like that of the claimant certainly does not follow from the interpretation of Article 28a in conjunction with Article 33(2). It is consequently not necessary to give an express answer to the fifth question. The considerations regarding the question asked are therefore purely hypothetical in nature.

It is necessary to proceed from the basis of Article 17a, which reads as follows:

'The recipient of a pension due under the legislation of a Member State or of pensions due under the legislation of several Member States who resides in the territory of another Member State may at his request be exempted from the legislation of the latter State provided that he is not subject to that legislation because of the pursuit of an occupation.'

That provision was incorporated into Regulation No 1408/71 by Council Regulation (EEC) No 2195/91.[49] The fourth recital of that regulation states:

'Whereas a new provision must be inserted in Regulation (EEC) No 1408/71 to exempt pensioners from the legislation of the State of residence when they are already entitled to sickness insurance, maternity and family benefits under the legislation of another Member State'.

72. Article 17a of Regulation No 1408/71 merely refers to a 'request' without specifying any further details. The requirement of making a request suggests that the initiative must be taken by the pensioner concerned. However, he can do that only if he is aware

49 — Council Regulation (EEC) No 2195/91 of 25 June 1991 amending Regulation (EEC) No 1408/71 on the application of social security schemes to employed persons, self-employed persons and members of their families moving within the Community and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1991 L 206, p. 2).

of the possibility. Accordingly, the institution(s) dealing with the matter must inform the person concerned of the possibility of availing himself of the right, because otherwise it will be likely to be forfeited.

73. With regard to the effects of such a request, it should be pointed out that it is for the national legal order to organise the administrative procedure, having regard, of course, to the requirements of Community law. The retrospective effect of a request made under Article 17a of the regulation therefore appears to be perfectly possible if and in so far as the person concerned was not previously informed of the possibility of making a request and its effects.

(6) *The seventh question*

74. By the seventh question the referring court seeks to ascertain whether the claimant is the object of discrimination prohibited under Community law and may therefore rely on the prohibitions of discrimination under Community law, as enshrined in Article 3 of Regulation No 1408/71 and Article 6 of the EC Treaty (now, after amendment, Article 12 EC).

75. It should first be pointed out that the present case is not a typical case of discrimination prohibited under Community law. The claimant is not treated any worse than a national in Finland. The case of a Finn who has settled in Sweden, which the referring court apparently assumes as a frame of reference for the comparison and with respect to which the claimant considers that unequal treatment exists, is not, having regard to the general principle of equal treatment, comparable with that of a Swede who has settled in Finland.

76. Nevertheless, although it is not directly a case to which the general prohibition of discrimination applies, the present case may involve a problem of equal treatment. Thus, the Commission argued in the abovementioned Treaty infringement proceedings against France [50] that persons residing in France who are subject to another Member State's legal order by virtue of their gainful employment in that Member State would be subject to 'unequal' treatment. However, this form of unequal treatment must be resolved by means of the prohibitions of barriers contained in Articles 48 and 52 of the Treaty. Comments have already been made on this subject above. [51]

50 — Cases C-34/98 and C-169/98 *Commission* v *France* (cited in footnote 43).

51 — See points 64 et seq. above.

VIII — Conclusion

77. In the light of the above considerations, I propose that the Court give the following answers to the questions in the order for reference:

(1) Both the Treaty establishing the European Community and Regulation No 1408/71 are applicable to a case like the present one.

(2) The expression 'nor is any pension payable' in Article 28a of Regulation No 1408/71 is to be interpreted as meaning that neither a State pension nor a pension based on gainful employment is payable. The assessment of the situation depends on the specific circumstances, that is to say the entitlement to a pension which is actually payable.

(3) Contributions which are levied in respect of old-age, invalidity and unemployment (State pension contributions) may, under the circumstances of the specific case, be subsumed under the terms 'contributions or similar payments' within the meaning of Article 33(2) of Regulation No 1408/71. In any case, however, they should be assessed on the basis of Articles 48 and 52 of the Treaty, which the levying of such contributions infringes in so far as the payment of contributions does not correspond to any entitlement to a benefit.