in question is intended to resolve is not to be answered differently according to whether or not the marriage bond still exists between the two parents who might, depending on the case, be entitled to benefits in respect of the same child. In view of the purpose of that provision, it should not be interpreted in a restrictive manner but as meaning that it applies to a divorced spouse.

3. The task assigned to the Court by Article 177 of the EEC Treaty is not that of delivering opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States.

In Case 149/82

REFERENCE to the Court by the Social Security Commissioner for a preliminary ruling under Article 177 of the EEC Treaty in the action pending before the Commissioner between

STEPHANIE ROBARDS

and

INSURANCE OFFICER

on the interpretation of Articles 73 (1) and 76 of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416) and on the interpretation and, if appropriate, the validity of Article 10 (1) (a) of Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71 (Official Journal, English Special Edition 1972 (I), p. 159),

THE COURT (Third Chamber)

composed of: U. Everling, President of Chamber, Lord Mackenzie Stuart and Y. Galmot, Judges,

Advocate General: G. F. Mancini
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted in pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and procedure

1. Article 73 (1) of Regulation No 1408/71 of the Council of 14 June 1971 provides that:

"A worker subject to the legislation of a Member State other than France shall be entitled to the family benefits provided for by the legislation of the first Member State for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State."

As to the term "member of the family" Article 1 (f) of that regulation contains the following definition:

" 'Member of the family' means any person defined or recognized as a member of the family or designated as a member of the household by the legislation under which benefits are provided or, in the cases referred to in Article 22 (1) (a) and Article 39, by the legislation of the Member State in whose territory such person resides; where, however, the said legislations regard as a member of the family or a member of the household only a person living under the same roof as the worker, this condition shall be considered satisfied if the person in question is mainly dependent on that worker."

Under Article 76 of Regulation No 1408/71:

"Entitlement to family benefits or family allowances under Articles 73 and 74 shall be suspended if, by reason of the pursuit of a professional or trade activity, family benefits or family allowances are also payable under the legislation of the Member State in whose territory the members of the family are residing."

Article 10 (1) (a) of Regulation No 574/72 of the Council of 21 March 1972 provides as follows:

"Entitlement to family benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance or employment, shall be suspended when during the same period and for the same member of the family:

(a) benefits are due in pursuance of Article 73 or Article 74 of [Regulation No 1408/71]. If however, the spouse of the worker or unemployed worker referred to in those articles exercises a professional or trade activity in the territory of the said Member State, the right to family benefits or family allowances due in pursuance of the said articles shall be suspended; and only those family benefits or family allowances of the Member State in whose territory the

member of the family is residing shall be paid, the cost to be borne by that Member State.

(b) . . ."

2. Mrs Stephanie Robards, a British national, married Mr Hugh John Robards in 1967. There are three children of the marriage. The family had been living in Ireland since 1970.

In 1978 the spouses separated and Mrs Robards returned to the United Kingdom. She was accompanied by her two youngest children, the eldest remaining in Ireland. Mrs Robards was in paid employment in the United Kingdom but Mr Robards continued to reside and work in Ireland.

The marriage was terminated by the High Court in England by a decree absolute of divorce dated 3 June 1980. By a custody order of that court dated 4 February 1980 custody of the two youngest children was awarded to the mother and custody of the eldest was awarded to the father who was ordered to pay a sum of UKL 9 per child per week by way of maintenance for the two youngest children.

Following her return to the United Kingdom, Mrs Robards received United Kingdom child benefit for the two children residing with her. After the divorce Mr Robards claimed payment of child benefits for his three children under Irish legislation which were awarded to him as from 1 July 1980. As regards the two youngest children payment was made pursuant to Article 73 (1) of Regulation No 1408/71. On learning of this, the Insurance Officer decided that the child benefits would cease to be payable to Mrs Robards after 6 July 1980. That decision was based, in respect of the two youngest children, on Article 73 (1) of Regulation No 1408/71 and Article 10 (1) (a) of Regulation No 574/72, the Insurance Officer having taken the view that the provision contained in the second sentence of Article 10 (1) (a) could no longer apply after divorce.

Mrs Robards appealed to the local tribunal against the decision of the Insurance Officer in so far as that decision affected the benefits paid in respect of her two youngest children. The Insurance Officer conceded that, in accordance with the principles laid down by decisions of the Court of Justice in that sphere, she was entitled to the difference between the higher amount of the United Kingdom benefits and the allowance paid to Mr Robards in Ireland. However, the local tribunal dismissed the appeal.

3. Mrs Robards appealed against that decision to the Social Security Commissioner.

The Social Security Commissioner considered that, if Mrs Robards and her former husband were both in the United Kingdom, there is no doubt that Mrs Robards would be entitled to child benefit in respect of the two children in priority to her former husband.

The Social Security Commissioner explained in that connection that in the United Kingdom, by virtue of the Child Benefit Act 1975, child benefit is paid to the person "responsible for the child". A person is treated as responsible for a child if that child is living with that person or the latter is contributing to the cost of providing for the child at a rate which is not less than the rate of child benefit. A series of rules of priority apply to competing claims where more than one person is responsible for a child. In particular, the person living with the

child receives the benefit in priority to a person contributing to the maintenance of the child. As regards the right to receive child benefit in the United Kingdom, it is not necessary that the claimant should be a worker or engaged in any professional or trade activity.

As far as Irish legislation is concerned, the Social Security Commissioner explained that, by virtue of the Children's Allowances Act 1944 and the Children's Allowances (Amendment) Act 1946 as amended by the Social Welfare (Miscellaneous Provisions) Act 1963, the person with whom a child, who qualifies for benefit, normally resides is to be qualified for a children's allowance. Apart from the case of a person making financial provision for the support of a child residing in an institution, there is no provision for qualifying a person for children's allowances for a child by reason only of his making a financial contribution to the child's maintenance.

The Social Security Commissioner considered that the determination of the dispute before him depended upon whether Mrs Robards's right to family benefits under United Kingdom legislation was suspended pursuant to Community provisions, in particular Article 10 (1) (a) of Regulation No 574/72 of the Council of 21 March 1972, as a result of the grant by the competent Irish institution of family benefits to Mr Robards in respect of the two children living with Mrs Robards.

In that connection Mrs Robards put forward *inter alia* the following arguments in the proceedings before the Social Security Commissioner:

(a) Under the terms of Article 10 (1) (a) of Regulation No 574/72 she continued to be the "spouse" of her former husband after the dissolution of the marriage. If it were otherwise, the absurd situation would be reached where she could claim United Kingdom child benefit for her eldest son living in Ireland, whilst, at the same time, her former husband can receive Irish child allowances for the children living in the United Kingdom.

(b) The children living with her cannot be regarded, since the dissolution of the marriage, as "members of the family" (within the meaning of Article 73 (1) of Regulation No 1408/71 and on the basis of the definition of that term in Article 1 (f) of that regulation) of Mr Robards, no matter what may be the provisions of national law on that point.

(c) By the mere fact that under Article 73 (1) of Regulation No 1408/71, the children are regarded as residing on Irish territory, Mr Robards does not satisfy the conditions laid down by Irish legislation requiring that the two children must be "normally residing with him".

(d) It would be contrary to the principle of equality of the sexes to deprive her of the right to family benefits in respect of the children living with her in the United Kingdom, the Member State to whose legislation she is subject.

Under those circumstances the Social Security Commissioner decided on 5 May 1982 to refer the following questions to the Court of Justice for a preliminary ruling under Article 177 of the EEC Treaty:

"1. How is the term 'member of the family' as used in Regulation No 1408/71 to be interpreted by a national law under which family

benefits are payable if that national law does not confer a right to such benefits by express reference to the payee thereof and the child in respect of whom they are paid being members of a family?

2. Is the right of a worker subject to the legislation of a Member State (in this case the Republic of Ireland) other than France to receive pursuant to Article 73 (1) of Regulation No 1408/71 family benefits under the legislation of that Member State in respect of children residing in another Member State (in this case the United Kingdom) liable to be suspended either:

   (a) under Article 76 of Regulation No 1408/71 if those children are residing with a worker in such other Member State who is entitled under the domestic law of that State to family benefits in respect of those children but whose right to those benefits is not conditional upon the fact that she is actually pursuing a professional or trade activity in that Member State;

   (b) under Article 10 (1) (a) of Regulation No 574/72 if the divorced spouse of that worker exercises a professional or trade activity in that other Member State and is entitled under the domestic law of that State to family benefits in respect of those children?

3. If the answer to Questions 2 (a) and 2 (b) are both in the negative:

   (a) are family benefits provided for by the law of a Member State to be regarded (for purposes of Article 10 of Regulation No 574/72) as due under Article 73 (1) of Regulation No 1408/71 for children normally residing outside the territory of a Member State if the law of that Member State qualifies a person for such family benefits only for children normally residing with him and he is normally residing in that Member State?

   (b) does it follow from the fact that a worker subject to the legislation of a Member State (in this case the Republic of Ireland) has due to him under the said Article 73 (1) family benefits in respect of children resident in another Member State (in this case the United Kingdom) that, by virtue of Article 10 of Regulation No 574/72, a worker in that other Member State is not entitled to receive or to receive in full comparable family benefits in respect of those children to which he or she would otherwise be entitled under the legislation of that Member State?

4. If the answer to Question 3 (b) is in the affirmative, is Article 10 of Regulation No 574/72 valid in so far as it operates to deprive a worker of family benefits to which he would be entitled under national law alone?"

4. The decision making the reference was received at the Court Registry on 30 May 1982.

In pursuance of Article 20 of the Protocol on the Statute of the Court of Justice of the EEC, written observations

were submitted by the Insurance Officer, represented by Ann V. Windsor, Senior Legal Assistant at the Department of Health and Social Security, by the Council of the European Communities, represented by John Carbery, Adviser in the Legal Department of the Council, and by the Commission of the European Communities, represented by John Forman, a member of its Legal Department.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court, by order of 28 October 1982, decided to assign the case to the Third Chamber pursuant to Article 95 (1) of the Rules of Procedure and to open the oral procedure without any preparatory inquiry.

II — Observations of the parties

1. Observations of the Insurance Officer

As regards the *first question,* the Insurance Officer refers to the definition contained in Article 1 (f) of Regulation No 1408/71 and observes that any legislation under which it is a condition for the grant of benefits that the person in question is responsible for the child and which treats a person as so responsible if the child lives with that person acknowledges by implication that the child and that person constitute a household within the meaning of that definition. Under United Kingdom legislation a child is to be regarded as a member of the household in which it lives. The question whether the same child may be considered a member of the family of a person residing in another Member State has to be answered with reference to the legislation of that Member State.

As regards the *second question,* the Insurance Officer observes that, by virtue of Article 73 (1) and in accordance with the general principle contained in Article 13 (2) (a) of Regulation No 1408/71, responsibility for paying family benefits for children residing in one Member State shifts to another Member State and the right to benefits in the first Member State is suspended. Article 76 of Regulation No 1408/71 and Article 10 (1) (a) of Regulation No 574/72 establish specific procedures designed to prevent the overlapping of family benefits and family allowances for workers.

The rule contained in the first sentence of Article 10 (1) (a), by virtue of which the benefit of the country of residence is suspended, is a general overlapping provision. Whereas Article 76 of Regulation No 1408/71 deals with the case where benefit payable in pursuance of Article 73 of Regulation No 1408/71 overlaps with benefit title to which arises only if the person concerned pursues a professional or trade activity, Article 10 (1) (a) of Regulation No 574/72 applies in the case where benefits are provided on the basis of residence. Article 76 is, therefore, not relevant to this case.

The second sentence of Article 10 (1) (a) is limited to spouses. Where both spouses are workers it could be said that there are competing rights and in those circumstances the regulations give priority to the country of residence even if, under the now well-established case-law of the Court (cf. judgment of 19. 2. 1981 in Case 104/80 *Beeck* [1981] ECR 503), that priority is made subject to a safeguard concerning the difference between the amount due under the legislation of the State of employment

and the amount received in the State of residence.

The question whether a person is the spouse of another person has to be answered in accordance with the legislation administered by the institution seeking to rely on the provisions of Article 10 of Regulation No 574/72. Thus, under United Kingdom legislation, a divorced person is described as a "former spouse" and is not included in the term "spouse".

If the second sentence of Article 10 (1) (a) of Regulation No 574/72 were applied to divorced persons, one or other of whom might well remarry, it would be conceivable that yet another Member State might be entitled to apply Article 73 of Regulation No 1408/71 the result of which would be that Article 10 (1) (a) of Regulation No 574/72 would fall to be applied a second time in respect of the same children. The total amount payable would therefore be greater than the highest rate of benefit in any of the Member States concerned. Such a result would not be justifiable.

The Insurance Officer further points out that, under Article 75 (1) (b) of Regulation No 1408/71 if benefits are not applied by the person to whom they should be provided for the maintenance of a member of the family, the competent institution is to discharge its legal obligations by providing those benefits to the person actually maintaining that member of the family through the agency of the competent authority of the country of residence. It is therefore possible for the beneficiary in the country of residence to request the competent institution in that country to apply to the competent institution in the Member State of employment to have the benefit paid direct to the country of residence.

In conclusion, the Insurance Officer takes the view that the answer to both parts of the second question should be in the negative.

As regards *part (a) of the third question*, entitlement to family benefit and family allowances by virtue of Article 73 of Regulation No 1408/71 arises, according to the Insurance Officer, when a worker is employed in a Member State, to whose legislation he is subject, while members of his family are residing in another Member State. The conditions to be fulfilled are those laid down by the legislation of the Member State of employment which also has to decide who are the members of the family. The fact that benefit is not payable to the worker himself because the child is not living under his roof would, regard being had to Article 1 (f) of Regulation No 1408/71, be relevant only if that is the criterion used for determining whether or not the person is a member of the worker's family. It is not relevant for the purposes of Article 73 (1) of Regulation No 1408/71 if it is only a criterion for determining who should be the beneficiary by virtue of the manner in which the family benefits scheme is operated.

As regards *part (b) of the third question*, the Insurance Officer considers that, if Article 73 (1) has been incorrectly applied, the country of residence is nevertheless justified in applying overlapping provisions. The question "who is a member of a worker's family" has to be resolved by reference to the legislation under which benefits are provided. The right of the country of employment to determine whether or not benefits are payable under its legislation cannot be denied. If that legislation does not recognize divorce the Member State

which is entitled to apply Article 10 of Regulation No 1408/71 may, nevertheless, properly do so on the ground that, for the same period and for the same children, benefits are due in pursuance of Article 73 of Regulation No 1408/71.

It is sufficient if it is ascertained whether, in pursuance of Article 73, family benefits have been awarded in the worker's country of employment to enable the overlapping provisions to be applied. The fact that Article 73 (1) may occasionally be misapplied should not lead to an interpretation of Article 10 which is contrary to the objectives of that provision.

The Insurance Officer is therefore of the view that the reply to that question should be in the affirmative.

As regards the *fourth question,* the Insurance Officer observes that Article 10 of Regulation No 574/72 constitutes both a general overlapping rule and an exception to the rule of priority for the legislation of the country of employment, neither of which may be said to be incompatible with the objectives of Article 51 of the Treaty. However, under the case-law of the Court, such a rule designed to prevent the overlapping of benefits is applicable only to the extent to which it does not, without cause, deprive those concerned of an entitlement to benefits conferred on them by the legislation of a Member State. Accordingly, in an appropriate case, where the amount of the allowances the payment of which is suspended exceeds that of the allowances received by virtue of the pursuit of a professional or trade activity, the rule on overlapping benefits contained in Article 10 (1) (a) of Regulation No 574/72 should be applied only in part and the difference between those amounts should be granted as a supplement.

The Insurance Officer therefore takes the view that the answer to the fourth question should be that the rule suspending family allowances in the country of residence, contained in Article 10 (1) (a) of Regulation No 574/72, is valid, only to the extent of the amount of the allowances payable in the country of employment and the difference between the amounts of those two allowances should be granted as a supplement.

2. Observations of the Council

The Council states first of all that it only wishes to give its views on the fourth question concerning the validity of Article 10 of Regulation No 574/72 and that its observations are intended to defend the validity of the measure adopted by it.

Article 10 of Regulation No 574/72 is designed to provide rules applicable in the case of overlapping of rights to family benefits or family allowances, and its task is to give effect to Chapter 7 of Regulation No 1408/71 and in particular Article 76 thereof. The rules contained in Article 10 of Regulation No 574/72 and Article 76 of Regulation No 1408/71 are a particular application of the general principle laid down in Article 12 of Regulation No 1408/71 which states that the regulation can neither confer nor maintain the right to several benefits of the same kind for one and the same period of compulsory insurance. Article 76 of Regulation No 1408/71 provides that, if benefits are also payable as a result of the pursuit of a professional or trade activity in the territory of the Member State in which the members of the family are resident, entitlement to benefits payable under Article 73 of that regulation is suspended. Article 10 of Regulation No 574/72 suspends the right to family benefits or family allowances irrespective of conditions of

insurance or employment where benefits are payable under Article 73 or 74 of the regulation.

However, an exception to that rule is provided for by Article 10 (1) (a) in favour of the spouse pursuing a professional or trade activity. That exception seeks to cover the most common case of migrant workers whose families live in two or more Member States and it was not the legislature's intention narrowly to restrict this exception to the spouse of the worker. It should rather be construed as covering the situation of the former spouse and indeed of the persons who have custody of the children, the failure by the legislation to mention such exceptional cases being regarded as an oversight. Child allowances are granted for the ultimate advantage of the child who would be most likely to receive benefit from them where they are paid to the person having effective charge of him or her.

Such an interpretation of Article 10 of Regulation No 574/72 would be in conformity with the case-law of the Court based on the fundamental principle of freedom of movement for workers and the objective of Article 51 of the EEC Treaty whereby a rule designed to prevent the overlapping of family allowances is applicable only to the extent to which it does not, without cause, deprive those concerned of an entitlement to benefits conferred on them by the legislation of a Member State. There is no mention in that case-law of the possible invalidity of Article 10 (1) (a) of Regulation No 574/72.

The Council considers that the Court should interpret the term spouse used in Article 10 (1) (a) of Regulation No 574/72 as covering those persons who have lawful custody of the children for whom child benefits are payable and with whom they reside, thus achieving the objective of the provision, namely to fill a vacuum which occurs in cases where marriages have been dissolved and the party having custody of the children is a worker within the meaning of the regulation.

3. Observations of the Commission

The Commission considers that the term "member of the family", used in Article 73 (1) of Regulation No 1408/71, is defined in Article 1 (f) of that regulation which refers to the "legislation under which benefits are provided". The Irish legislation must therefore be considered to see whether it regards the children in question as being "any person defined or recognized as a member of the family or designated as a member of the household". In that connection Article 1 (f) states that, where the relevant legislation provides that such persons need to be living under the same roof as the worker, that condition is deemed to be satisfied if the person in question is mainly dependent on that worker.

It appears that the Irish legislation does not make express use of the concepts as used in Article 1 (f) of the regulation. Its test is rather that of "normal residence", as the Social Security Commissioner explained in his decision. In applying Article 73 (1) of Regulation No 1408/71 the Irish authorities ought to have considered whether — and always

assuming the person was considered to be a member of the family under Irish legislation — the statutory test of "normal residence" fell within the concept of "under the same roof". If that were considered to be the case, the person in question could always be regarded as a member of the family even if he were not, in fact, so resident, but nevertheless "mainly dependent on [that] worker".

The meaning to be given to the Community provisions in question is therefore very much dependent on the relevant national provisions. Only in the second limb of Article 1 (f) could Community law oblige that legislation to be interpreted in a particular way by providing that the phrase "being under the same roof as the worker" may be deemed to mean "is mainly dependent on that worker".

If, at this stage, it were considered that Article 73 (1) of Regulation No 1408/71 is applicable to the facts of the case and confers on Mr Robards the right to Irish family benefits for the two children residing in the United Kingdom, the need for an interpretation of the further Community provisions cited in the decision making the reference would still arise.

In that connection, the Commission observes first that Article 76 of Regulation No 1408/71 cannot be applied in this case because the benefits in question are not payable in the United Kingdom "by reason of" the pursuit of a professional or trade activity.

As regards Article 10 (1) (a) of Regulation No 574/72, the effect of that provision prior to the divorce was to suspend the Irish benefits by reason of the pursuit by Mrs Robards of a professional or trade activity in the United Kingdom. The question therefore arises whether, for the purposes of that provision, a "spouse" may, in certain circumstances, cover a "former" spouse.

The Commission would be prepared to give an affirmative reply to that question. Rather than a strict interpretation of the word "spouse", the emphasis should rather be on the "professional" situation of the worker in question. The fact that Mrs Robards is working in the United Kingdom should take precedence over the circumstance that she is no longer married. Moreover, since the Community's rules on social security were first drafted the automaticity which attached to the traditional concept of the family and its members has often given way to more flexible notions of dependency and responsibility.

Therefore, the reply to be given to part (b) of the second question raised by the Social Security Commissioner is in the affirmative and, consequently, the other questions do not call for further consideration.

III — Oral procedure

At the hearing on 25 November 1982 oral argument was presented by the following: Michael Douglas, barrister, for Stephanie Robards; Ann V. Windsor, for the Insurance Officer; John Carbery for the Council; and John Forman, for the Commission.

Mrs Robards claimed in particular that, in order to avoid any difficulties in the case of divorced spouses, it is not sufficient to interpret Article 10 (1) (a) of Regulation No 574/72 but it must be stated more generally that Articles 73 and 76 of Regulation No 1408/71 and

Article 10 of Regulation No 574/72 may in no event have the effect of depriving members of an autonomous family unit, of which the worker does not form part, as is the case, after divorce, of the former spouse who does not have the custody of the children, of the benefits to which they are entitled under the legislation of the Member State in which they reside.

The Advocate General delivered his opinion at the sitting on 16 December 1982.

Decision

1 By decision of 5 May 1982, which was received at the Court on 13 May 1982, the Social Security Commissioner referred to the Court for a preliminary ruling pursuant to Article 177 of the EEC Treaty four questions on the interpretation of Articles 1 (f), 73 and 76 of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416) and of Article 10 (1) (a) of Regulation No 574/72 of the Council of 21 March 1972 fixing the procedure for implementing Regulation (EEC) No 1408/71, as well as on the validity of the latter article.

2 Those questions were raised in the context of proceedings pending before the Social Security Commissioner between Stephanie Robards, a British national residing in the United Kingdom, and the Insurance Officer concerning Mrs Robards's entitlement to family benefits under United Kingdom legislation in respect of the two of her children of whom she has custody.

3 Mrs Robards was married to Mr Hugh Robards. There were three children of the marriage. The family lived in Ireland. In 1978 the spouses separated and Mrs Robards, accompanied by her two younger children, returned to the United Kingdom where she has been and continues to be in paid employment. The eldest child remained in Ireland where Mr Robards continued to reside and to work. The marriage was dissolved by a decree absolute of divorce of the High Court in England dated 3 June 1982. Custody of the two younger children was awarded to the mother and custody of the eldest to the father who was, in addition, ordered to pay a sum by way of maintenance for the two younger children.

4 On her return to the United Kingdom Mrs Robards received United Kingdom child benefit. After the divorce Mr Robards claimed payment of children's allowances under Irish legislation which were granted to him as from 1 July 1980. As regards the two younger children, residing in the United Kingdom, the allowances were granted pursuant to Article 73 (1) of Regulation No 1408/71. Following that decision, the Insurance Officer withheld United Kingdom child benefit from Mrs Robards. In respect of the two younger children, that decision was based on Article 73 (1) of Regulation No 1408/71 and Article 10 (1) (a) of Regulation No 574/72. However, he subsequently conceded that, by virtue of the principle laid down in the judgment of the Court of 19 February 1981 in Case 104/80 *Beek* v *Bundesanstalt für Arbeit* [1981] ECR 503, the payment of the United Kingdom benefit should only be suspended up to the amount of the Irish allowances paid to Mr Robards.

5 Mrs Robards appealed against the decision to suspend payment of United Kingdom benefit in respect of her two younger children.

6 When the matter was brought before the Social Security Commissioner he took the view that Mrs Robards's right to receive United Kingdom child benefit raised questions of Community law. He therefore decided to stay the proceedings and to refer to the Court a series of questions relating to the provisions of Regulations Nos 1408/71 and 574/72 as to family benefits and allowances and concerning in particular:

(1) the interpretation of the term 'member of the family' as used in the provisions of Regulation No 1408/71 relating to family benefits;

(2) the application to family benefits payable under Article 73 of Regulation No 1408/71 of rules against the overlapping of benefits contained in

(a) Article 76 of Regulation No 1408/71, and

(b) Article 10 (1) (a) of Regulation No 574/72;

(3) the interpretation of Article 73 of Regulation No 1408/71 for the purposes of the application of the rule against the overlapping of benefits contained in Article 10 of Regulation No 574/72;

(4) the validity of Article 10 of Regulation No 574/72 in so far as it operates to deprive a worker of family benefits to which he would be entitled under national law alone.

The Community regulations referred to in the questions

7 By virtue of Article 73 (1) of Regulation No 1408/71, family benefits provided for by the legislation of a Member State are payable to a worker "for members of his family residing in the territory of another Member State, as though they were residing in the territory of the first State". However, the rule of priority in the case of overlapping benefits laid down by Article 76 of Regulation No 1408/71 suspends the right to benefits payable under Article 73 "if, by reason of the pursuit of a professional or trade activity ... benefits ... are also payable under the legislation of the Member State in whose territory the members of the family are residing". On the other hand, Article 10 (1) of Regulation No 574/72 provides:

"Entitlement to family benefits or family allowances due under the legislation of a Member State, according to which acquisition of the right to those benefits or allowances is not subject to conditions of insurance or employment, shall be suspended when during the same period and for the same member of the family:

(a) benefits are due in pursuance of Article 73 or Article 74 of [Regulation No 1408/71]. If, however, the spouse of the worker or unemployed worker referred to in those articles exercises a professional or trade activity in the territory of the said Member State, the right to family benefits or family allowances due in pursuance of the said articles shall be suspended; and only those family benefits or family allowances of the Member State in whose territory the member of the family is residing shall be paid, the cost to be borne by that Member State.

(b) ..."

8 It is clear from the Social Security Commissioner's decision making the reference to the Court that, as regards the right to receive child benefit, it is not necessary under United Kingdom legislation that the claimant should be a worker or be engaged in any professional or trade activity, since that benefit is paid to the person who is responsible for a child irrespective of

conditions of insurance or employment. The fact that such benefit is payable cannot therefore have the effect of causing the benefits payable in pursuance of Article 73 of Regulation No 1408/71 to be suspended under Article 76 of that regulation. On the other hand, the question remains whether under Article 10 (1) (a) of Regulation No 574/72 entitlement to the aforesaid benefit might be suspended if, in respect of the same children, benefits were payable in pursuance of Article 73 of Regulation No 1408/71 and the derogation provided for in the second sentence of Article 10 (1) (a) were inapplicable.

9 In that context, the questions submitted by the Social Security Commissioner seek in essence to ascertain whether the fact that family benefits are payable in pursuance of Article 73 of Regulation No 1408/71 to a worker in respect of children living with the divorced spouse, who works in another Member State, has the effect, by virtue of the rules against the overlapping of benefits laid down by Article 10 (1) (a) of Regulation No 574/72, of suspending family benefits payable under the national legislation of that other Member State.

The first sentence of Article 10 (1) (a) of Regulation No 574/72

10 The first sentence of Article 10 (1) of Regulation No 574/72, which contains that provision for suspension, refers to Article 73 of Regulation No 1408/71. The expression "member of the family", mentioned in that latter provision, is defined by Article 1 (f) of the latter regulation. That definition principally refers to the national legislation under which benefits are provided.

11 Since the grant of family benefits under Article 73 of Regulation No 1408/71 is subject to the interpretation and the application of national legislation, the competent institution of another Member State is not in a position to determine whether the conditions for granting such benefits are all satisfied. For the purposes of Article 10 (1) (a) of Regulation No 574/72, that institution may therefore confine itself to recording the fact that the competent institution of another Member State has, pursuant to Article 73 of Regulation No 1408/71, granted to a worker, in respect of the same child, family benefits under its own legislation.

12 The reply to be given to the Social Security Commissioner must therefore be that the provision for suspension contained in the first sentence of Article 10 (1) (a) of Regulation No 574/72 must be interpreted as meaning that it applies whenever the institution of another Member State has in fact granted family benefits to a worker in respect of the same child, in pursuance of Article 73 of Regulation No 1408/71, without its being necessary to examine whether all the conditions for the grant of those benefits are satisfied under the legislation of that other Member State.

13 In those circumstances it is no longer necessary to answer the questions concerning the interpretation of Article 73 of Regulation No 1408/71 and of the term "member of the family".

The second sentence of Article 10 (1) (a) of Regulation No 574/72

14 The questions submitted by the Social Security Commissioner then seek to ascertain whether the derogation provided for by the second sentence of Article 10 (1) (a) of Regulation No 574/72 covers the case of a divorced spouse.

15 The provision in question, like Article 76 of Regulation No 1408/71 which is also concerned with an instance of the overlapping of family benefits, seeks to give priority to the benefits of the Member State in the territory of which the children reside and in which one of the recipients in question pursues a professional or trade activity. The problem of overlapping benefits which the provision in question is intended to resolve is not to be answered differently according to whether or not the marriage bond still exists between the two parents who might, depending on the case, be entitled to benefits in respect of the same child. In view of the purpose of that provision, it should not be interpreted in a restrictive manner.

16 The Insurance Officer contended that the concept "spouse" should not be interpreted broadly so as to cover a divorced spouse, since this could give rise to difficulties were the divorced spouse to remarry, as several Member States might then be in a position to apply Article 73 of Regulation No 1408/71 with the result that there might be an overlapping of benefits.

17 In the Council's view the intention of the legislature was to cover not merely the divorced spouse but any person, other than a spouse, having the legal custody of a child, the exeptional cases in which that person is not a spouse being, by an oversight, not expressly mentioned by the provision in question.

18 Mrs Robards claimed that a wide interpretation of Article 10 (1) (a) of Regulation No 574/72 is not sufficient to resolve all the difficulties which might exist in the case of divorce as regards family benefits, for example in the case of unemployment. She suggested that the reply to be given to the questions submitted should be that Articles 73 and 76 of Regulation No 1408/71 and Article 10 of Regulation No 574/72 cannot in any event have the effect of depriving the members of an autonomous family unit, of which the worker does not form part, of benefits to which they are entitled under the legislation of the Member State in which they reside.

19 However, the task assigned to the Court by Article 177 of the EEC Treaty is not that of delivering opinions on general or hypothetical questions but of assisting in the administration of justice in the Member States. In this case, therefore, the interpretation of the provision in question should be confined to the case which is before the national court, namely that of a divorced spouse who has not remarried and is carrying on a professional or trade activity. It would be for the Commission and the Council to take the necessary measures in order to amend the provision in question if it appeared that such an amendment were necessary in order to enable other cases to be satisfactorily resolved.

20 The reply to be given therefore to the Social Security Commissioner is that the second sentence of Article 10 (1) (a) of Regulation No 574/72 must be interpreted as meaning that it applies to a divorced spouse.

21 In view of that reply there is no need to answer the fourth question relating to the validity of Article 10 (1) (a) of Regulation No 574/72 which was submitted in the event of that provision's having the effect of depriving the divorced spouse of entitlement to family benefits to which that spouse would be entitled under national law alone.

Costs

22 The costs incurred by the Council and the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main proceedings are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (Third Chamber),

in answer to the questions referred to it by the Social Security Commissioner by decision of 5 May 1982, hereby rules:

1. **The provision for suspension contained in the first sentence of Article 10 (1) (a) of Regulation No 574/72 of the Council of 21 March 1972 must be interpreted as meaning that it applies whenever the institution of another Member State has in fact granted family benefits to a worker in respect of the same child, in pursuance of Article 73 of Regulation No 1408/71 of the Council of 14 June 1971, without its being necessary to examine whether all the conditions for the grant of those benefits are satisfied under the legislation of that other Member State.**

2. **The second sentence of Article 10 (1) (a) of Regulation No 574/72 must be interpreted as meaning that it applies to a divorced spouse.**

Everling Mackenzie Stuart Galmot

Delivered in open court in Luxembourg on 3 February 1983.

J. A. Pompe
Deputy Registrar

U. Everling
President of the Third Chamber