In Case 115/77

REFERENCE to the Court under Article 177 of the EEC Treaty by the Landessozialgericht für das Land Nordrhein-Westfalen (Higher Social Court for North Rhine/Westphalia), Essen, for a preliminary ruling in the action pending before that court between

GERT LAUMANN AND ANJA LAUMANN

and

LANDESVERSICHERUNGSANSTALT RHEINPROVINZ, Düsseldorf,

on the interpretation of Article 79 (3) of Regulation (EEC) 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),

THE COURT,

composed of: H. Kutscher, President, M. Sørensen and G. Bosco (Presidents of Chambers), J. Mertens de Wilmars, P. Pescatore, Lord Mackenzie Stuart and A. O'Keeffe, Judges,

Advocate General: G. Reischl
Registrar: A. Van Houtte

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the observations submitted pursuant to 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. The dispute in the main action centres on Article 79 (3) of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 (Official Journal, English

Special Edition 1971 (II), p. 416) which falls amongst the provisions of Chapter 8 entitled "Benefits for dependent children of pensioners and for orphans" of Title III, "Special provisions relating to the various categories of benefits", of that regulation.

2. Article 77 concerns dependent children of pensioners. Article 78, which concerns orphans, provides in paragraph (1):

"The term 'benefits', for the purposes of this article, means family allowances and, where appropriate, supplementary or special allowances for orphans and orphans' pensions . . ."

and in paragraph (2):

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

(a) for the orphan of a deceased worker who was subject to the legislation of one Member State only in accordance with the legislation of that State;

(b) . . ."

3. Article 79, which contains provisions common to benefits for dependent children of pensioners and for orphans, provides in paragraph (3):

"The right to benefits due under . . . Articles 77 and 78 shall be suspended if the children become entitled to family benefits or family allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity. In such a case, the persons concerned shall be considered as members of the family of a worker."

4. The appellants in the main action, Gert Laumann, born on 7 April 1965, and Anja Laumann, born on 13 January 1967, both of German nationality, are the minor children born of the marriage which was subsequently dissolved by divorce between Hubert Laumann, who died on 11 January 1974, and Waltraud Laumann.

5. By decision of 18 July 1975 the Landesversicherungsanstalt Rheinprovinz (the regional insurance institution for the Rhine province), which has its head office in Düsseldorf, granted the appellants from 11 January 1974 orphans' pensions of DM 197.20 each per month and, from 1 July 1975, DM 219.10 each per month. However, the Landesversicherungsanstalt, on the basis of the provisions of Article 79 (3) of Regulation (EEC) No 1408/71, suspended the appellants' pension rights on the grounds that the husband of their mother, the latter having remarried, has been in receipt since 1 August 1972 of family allowances under the Belgian system of social security in respect of the appellants who live with him at Eupen in Belgium. Those family allowances are paid by the Caisse de Compensation pour Allocations Familiales (Family Allowances Compensation Fund) for the Liège area for the employment periods completed in Belgium by the appellants' stepfather.

6. By judgment of 29 October 1976 the Sozialgericht (Social Court) Düsseldorf dismissed the appellants' action against the said decision. The Sozialgericht considered that the decision and its statement of reasons were lawful.

7. By an order of 1 September 1977 the Landessozialgericht für das Land Nordrhein-Westfalen (Higher Social Court for North Rhine-Westphalia) Essen, to which the appellants appealed against the above-mentioned judgment, stayed the proceedings and referred the following preliminary questions to the Court of Justice of the European Communities, pursuant to Article 177 of the EEC Treaty:

"1. Where, following the remarriage of a widowed mother who is entitled in Germany to a family allowance under the Bundeskindergeldgesetz (Federal Law on family allowances) in addition to an orphans' pension, an orphan moves to Belgium and the stepfather receives a family allowance in respect of the orphan from the Caisse de Compensation pour Allocations Familiales de la Région Liégeoise, is the right to a German orphans' pension under Article 1267 of the Reichsversicherungsordnung (National insurance regulation), having regard to Article 79 (3) of Regulation (EEC) No 1408/71, suspended:

(a) in its entirety or

(b) only in so far as the German orphans' pension and the Belgian family allowance together exceed the sum of the German orphans' pension and the German dependent child allowance under the Bundeskindergeldgesetz?

2. Or is Article 79 (3) of Regulation (EEC) No 1408/71 to be understood in the sense that rights to benefits under Articles 77 and 78 and Article 79 (2) of that regulation are to be suspended in order to avoid duplication of benefits only where rights which by their nature are similar are given in another Member State? That is to say: rights to an orphans' pension against insurance institutions in two Member States lead to the suspension of one of the rights to an orphans' pension and rights to a family allowance in two Member States lead to the suspension of one of the rights to a family allowance, while rights in two Member States which by their nature are different (for example on the one hand a family allowance and on the other an orphans' pension) are not covered by Article 79 (3)."

8. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

II — Summary of the written observations submitted under Article 20 of the Protocol on the Statute of the Court of Justice of the EEC

The *appellants* in the main action confine themselves to lodging a statement of the family allowances paid in their favour by the Belgian Fund to their stepfather.

The *respondent in the main action* considers that Article 79 (3) of Regulation (EEC) No 1408/71 prescribes two conditions for the suspension of the right to orphans' benefits:

1. Such benefits must constitute orphans' pensions or corresponding benefits (Article 78 (1)); and
2. It is necessary with regard to children who are primarily recipients under the provisions of Article 78 (1) that a right to family benefits or allowances should be acquired under the legislation of a Member State by virtue of the pursuit of a professional or trade activity.

If those conditions are fulfilled the right to the benefits due under the above-mentioned provisions must be suspended in its entirety.

In fact the rule in Article 79 (3) applies only to children who are entitled to benefits. This is clear from the last sentence: "In such a case, the persons concerned shall be considered as members of the family of a worker", which must mean that for reasons of equality of treatment and where there are a number of different rights to benefits the children must not be

considered as survivors of a worker but as members of the family of a worker and that they cannot on that particular ground claim a right to an orphans' pension but merely a right to family benefits or allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity.

The *Italian Government* maintains first of all that since no provision of national legislation prescribes the suspension of the orphans' pension in the present case the order making the reference must be interpreted to mean that the suspension which has been brought before the national court is based solely upon Regulation (EEC) No 1408/71. Furthermore, it is for the Court of Justice to establish whether the preliminary questions referred to it are concerned exclusively with the interpretation or in addition with the validity of Article 79 (3) of that regulation.

The Italian Government then emphasizes that in its view, on the basis of the wording of Article 1 of the regulation, there is a difference in kind between family allowances (of which the direct and sole recipient is the worker, not the member of the family on account of whom they are paid) and an orphans' pension (of which the direct and sole recipient is the orphan, even if he is represented for the actual receipt thereof by the natural or legal person actually maintaining him). The fact that this difference which, in addition, is also recognized by Article 44 (3) of the regulation, which excludes orphans' pensions from the scope of Chapter 3, "Old age and death (pensions)", of Title III, is not fully taken into consideration in Article 78 (1) (or, in consequence, in Article 79) may appear as an internal contradiction within the regulation. In fact "the pursuit of a professional or trade activity" (Article 79 (3) and Article 12 (3)) constitutes the individual act of a specific person, the exercise of a personal choice; whilst it is possible to justify such act's producing legal effects with regard to invalidity benefits or the anticipated old-age benefits payable to the very person responsible for that act, it is impossible to justify that act's producing legal effects with regard to a third party and adversely affecting his interests. In the present case the two orphans have suffered the suspension of their rights to the orphans' pension as the result of the second marriage of their mother and by virtue of the pursuit of a professional or trade activity by their stepfather.

On the basis of the foregoing considerations the Italian Government proceeds to consider in particular the proper interpretation of the provisions of Article 78 (1) and Article 79 (3) of Regulation (EEC) No 1408/71.

Article 48 (2) of the Treaty prohibits "any discrimination" between workers of the Member States and also between those entitled under them to insurance benefits deriving from an occupation. There is no suspension of a person's entitlement to an orphans' pension while he remains within the Member State required under national legislation to pay that pension. On the other hand, such suspension may come into operation if Article 79 (3) becomes applicable.

Acceptance of the interpretation which the respondent in the main action places upon that provision would result in an unjustified difference in treatment between an orphan who remained within a Member State and one who, moving within the Community, transferred his residence to another Member State.

Furthermore, Article 51 of the Treaty established the principle of the "retention" of the right to insurance benefits and of the payment of such benefits when workers and "their dependants" move from one Member State to another within the Community. The Italian Government maintains that

there would be a violation of the principle that the place of residence of the recipient of insurance benefits is of no importance, if the "suspension" referred to in Article 79 (3) of the regulation were to produce the effect urged by the respondent in the main action.

Furthermore, the interpretation which the respondent in the main action places upon the legislation in question is incompatible with the objective of avoiding privileged situations consisting in the overlapping of an orphans' pension with family allowances amounting to more than was provided for under the legislation of the Member State applicable to the deceased worker. In order to attain this objective it is sufficient to establish that the amount of the benefits which an orphan obtains pursuant to the legislation of the Member State to which the deceased worker was subject constitutes a ceiling which may not be exceeded when the orphan moves to the territory of another Member State; in this way the orphan who moves within the Community is not adversely affected by the application of a provision of Community legislation.

Alternatively, the orphan moving from one Member State to another could be permitted to exercise an option, through a declaration made by his legal representative, for "mixed" treatment consisting of a number of benefits provided by institution of different States which together are not less than the benefits to which he is entitled under the legislation of the State to which the deceased worker was subject.

The Italian Government relies upon the decisions of the Court of Justice in Case 24/75, *Petroni* ([1975] ECR 1149) and in Case 112/76, *Manzoni* ([1977] ECR 1647) and recalls the Court's dictum that the aim of Articles 48 to 51 of the Treaty would not be attained if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages guaranteed to them by the laws of a single Member State. This principle must also apply in favour of the "dependants" of a deceased worker and result in a declaration that Article 79 (3) is in part unlawful.

The Italian Government states, however, that it seems possible on a correct interpretation of Article 79 (3) to attain the desired aim of avoiding both placing orphans in a privileged situation and treating them unfavourably in relation to the treatment guaranteed them under the legislation of an individual Member State. In fact the sentence "... the persons concerned shall be considered as members of the family of a worker" shows clearly that the legislature was thinking principally of family allowances and intended to set up a scheme for such allowances. The link with benefits which are not "of the same kind" as family allowances is not contained in Article 79 (3) but follows as a result of the reference to "paragraph 2 and under Articles 77 and 78".

It thus appears possible to maintain that that assimilation involves suspension only where benefits "of the same kind" are concerned, and more particularly that Article 79 (3) prohibits the overlapping of family allowances in favour of the same orphan under the legislation of a number of Member States.

Furthermore, regard must be had to the fact that "the right ... to family benefits or family allowances" under the legislation of the Member State in which the professional or trade activity referred to in Article 79 (3) was pursued does not appear to constitute a "right" which cannot be renounced. Consequently, it cannot be ruled out that the orphan (or his legal representative) may renounce that part of the "right" which exceeds the amount of the benefits previously received and thus exercise an option in favour of the treatment most beneficial to him.

The Italian Government suggests that the following reply should be given to the questions submitted:

— Article 79 (3) of Regulation (EEC) No 1408/71 must be interpreted to mean that it precludes the overlapping of several family allowances theoretically due under the legislation of several Member States "with respect to" the same "child" but not the overlapping of an orphans' pension granted by one Member State with family allowances granted by another Member State to the individual on whom the child is held to be dependent.

— Alternatively, Article 79 (3) of Regulation (EEC) No 1408/71 must be interpreted to mean that it entitles the child to opt for the retention of benefits which are payable to him under Articles 77 and 78 of that regulation in so far as is necessary to ensure that he receives treatment as favourable as that which he previously enjoyed.

The *Commission* observes first that, unlike the general system laid down by Article 12 (2) and (3) of Regulation (EEC) No 1408/71, Article 79 (3) establishes a specific prohibition on overlapping within the framework of Community law.

The Commission next considers the view inherent in the questions submitted by the court making the reference, that the right of the appellants in the main action to an orphans' pension *is governed by the statement of the persons covered by Regulation (EEC) No 1408/71*, and maintains that the facts on which the dispute in the main action turns do not provide any grounds for the conclusion that the deceased father, the mother or the stepfather of the appellants are or were workers moving within the Community. In those circumstances the appellants' rights to a German orphans' pension and to Belgian family allowances can be coordinated in accordance with the provisions of Article 79 (3) only if the persons thereby covered include, apart from workers moving within the Community, workers who are not moving within the Community.

Although Article 78 (2) and Article 2 (1) (the general provision concerning the persons covered by the regulation) do indeed expressly include workers who were or are covered by the legislation of a single Member State, that merely amounts to taking account of the fact that all movements do not necessarily bring about the application of the laws of several countries. For example, a worker may possibly move before commencing his first employment. It follows that the provisions of Article 79 (3) of the regulation relate only to orphans' benefits directly or indirectly affected by the movement of a parent and not to benefits intended for orphans who, on other independent grounds, are entitled under the legislation of several Member States. In the present case the suspension of the German orphans' pension can only be decided under the provisions of the Reichsversicherungsordnung and not under Community law.

Only if the overlapping of the German orphans' pension with the Belgian family allowances were due to the fact that the appellants' father or stepfather moved between the said Member States, which, the Commission maintains, was not the case with the events involved in the main action, would the Commission raise the questions put by the court making the reference, beginning with the final question, since if that question is answered in the affirmative the two former questions become devoid of purpose.

The Commission first remarks that the orphans' pension and the family

allowances constitute quite dissimilar benefits and then states that Article 79 (3) relates moreover to family benefits for orphans, who are considered both in their general status as children and in their specific status as orphans. Furthermore, Article 79 governs as a whole the overlapping of benefits within the meaning of Article 78 with benefits payable in the State of residence by virtue of the pursuit of a professional or trade activity. The overlapping of those two categories of benefits appears to entail the suspension of the rights acquired in the competent Member State in accordance with Article 78.

It should be noted in order to clarify the provisions of Article 79 (3) that those provisions concern only one of two possible cases of overlapping, namely overlapping with benefits provided by virtue of the pursuit of a professional or trade activity and not overlapping with benefits provided on the basis of residence. This latter case of overlapping is covered by Article 10 (1) (b) of Regulation No 574/72 (as modified by Regulation No 878/73) fixing the procedure for implementing Regulation No 1408/71. Those two provisions, read together, provide a complete picture of the Community rules covering all possible cases of overlapping.

In accordance with those provisions the overlapping of rights to family benefits or family allowances, supplementary or special orphans' pensions with rights to family benefits or family allowances payable in the State where the orphans reside is governed as follows:

1. Where rights are acquired in the State of residence by virtue of the pursuit of a professional or trade activity the right to benefits due under Article 78 is suspended (Article 79 (3)).

2. Where acquisition of the right to benefits payable in the State of residence is not subject to conditions of insurance or employment and where the person on whom the orphans are dependent

   (a) does not pursue a professional or trade activity in the territory of that State rights acquired in the State of residence are suspended (Article 10 (1) (b));

   (b) pursues a professional or trade activity in that territory rights acquired in pursuance of Article 78 are suspended but not rights to benefits which are not family allowances, that is to say orphans' benefits or orphans' pensions (Article 10 (1) (b)).

The exception set out in 2 (b) above is relevant to the present case since it provides a basis for the conclusion that the overlapping of special allowances or pensions provided for orphans in the competent State in accordance with Article 78 with family allowances provided in the State of residence in which the trade or professional activity is pursued not merely cannot be prohibited but must be guaranteed. What holds good in the case of Article 10 (1) (b) cannot be otherwise in the case of Article 79 (3).

It can thus be considered that Article 10 (1) (b) confirms that the overlapping of benefits granted to orphans as such with family benefits provided without regard for that particular status does not constitute an unjustified overlapping of benefits from a social point of view.

In conclusion, the Commission is of the view that the following reply could be given to the questions submitted:

1. Article 79 (3) of Regulation No 1408/71 prohibits the overlapping of rights under Article 78 and Article 79 (2) of the said regulation with rights to family benefits or family allowances acquired by virtue of the pursuit of a professional or trade activity where the overlapping of such rights is due to circumstances

relating to the movement within the Community of the insured worker.

2. According to the provisions of Article 79 (3) the right to supplementary or special allowances for orphans or orphans' pensions is to be suspended only in so far as it overlaps with rights similar in kind to family benefits or family allowances acquired by virtue of the pursuit of a professional or trade activity.

III — Oral procedure

The appellants in the main action, represented by L. Dahmen, and the Commission of the European Communities, represented by Dr N. Koch, acting as Agent, presented oral argument at the hearing on 15 February 1978.

The Advocate General delivered his opinion at the hearing on 2 March 1978.

Decision

1 By an order of 1 September 1977, received at the Court Registry on 27 September 1977, the Landessozialgericht für das Land Nordrhein-Westfalen in Essen referred to the Court under Article 177 of the EEC Treaty a series of questions on the interpretation of Article 79 (3) of Regulation (EEC) 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).

2 The file establishes that, following the divorce of their parents in the Federal Republic of Germany and the remarriage of their mother to a Belgian national, the appellants in the main action, who are minors of German nationality, now live in Belgium in the home of their mother and stepfather.

The appellants in the main action are contesting before the court making the reference the decision of the competent German social security institution to grant them, in respect of the death of their father, the right to payment of an orphans' pension whilst suspending that right on the ground that their stepfather receives family allowances for them under the Belgian system.

The competent German institution based its decision to suspend the pension on the provisions of Article 79 (3) of Regulation No 1408/71, which states that the right to orphans' benefits due in particular under the provisions of

Article 78 shall be suspended "if the children become entitled to family benefits or family allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity. In such a case, the persons concerned shall be considered as members of the family of a worker".

3 In its first question the national court asks whether, having regard to Article 79 (3) of the regulation, the right to a German orphans' pension is suspended in its entirety or only in so far as the German orphans' pension and the Belgian family allowances together exceed the sum of the said pension and the German dependent child allowances.

By the second question the national court wishes to establish whether Article 79 (3) must be understood in the sense that rights to benefits acquired under Articles 77, 78 and 79 (2) of the regulation are to be suspended in order to avoid duplication of benefits only where rights of the same kind have been granted in another Member State.

Persons covered by the regulation

4 The Commission has questioned whether Regulation No 1408/71 is applicable to the present case since neither the father, the mother nor the stepfather of the appellants has moved from one Member State to another in connexion with work.

5 As in the case of the earlier Regulation No 3, the persons covered by Regulation No 1408/71, as is indicated by its heading, include not only employed persons but also their families moving within the Community.

Thus pursuant to Article 2 (1) of Regulation No 1408/71 which defines the persons covered by the regulation the provisions of the latter shall apply to the survivors of workers who are or have been subject to the legislation of one or more Member States.

The general terms in which those provisions are couched show that the application of the regulation is not limited to workers or their survivors who have had employment in several Member States or who are, or have been, employed in one State whilst residing or having resided in another.

Thus the regulation also applies when the residence in another Member State was that not of the worker himself but of a survivor of his.

The questions submitted

6 The second question should be answered first since, if the reply is in the affirmative, the two parts of the first question become devoid of purpose.

7 Article 78 of the regulation, which covers orphans' benefits, provides in paragraph (1) that the term "benefits" means "family allowances and, where appropriate, supplementary or special allowances for orphans and orphans' pensions . . .".

Whilst the above-mentioned article, the purpose of which is to define the legislation under which orphans' benefits must be granted, includes family allowances and orphans' pensions, those two types of benefit are of a clearly different kind, and this is furthermore recognized in Article 4 (1) of the regulation, which draws an express distinction between survivors' benefits and family benefits.

On the one hand, according to Article 1 (u) (ii) of the regulation the term "family allowances" means "periodical cash benefits granted exclusively by reference to the number and, where appropriate, the age of members of the family".

In the system established by Regulation No 1408/71 family allowances are generated by an actual occupation (even if the worker is no longer engaged in such occupation) and the direct and sole recipient is the worker himself.

On the other hand, the direct and sole recipient of the orphans' pension is the orphan himself and the pension, like other survivors' benefits, constitutes the projection in time of a prior occupation, pursuit of which ceased on the death of the worker.

The provisions of Article 79 (3) of Regulation No 1408/71 must be interpreted in the light of these considerations.

8 Where Article 79 (3) provides that if children become entitled to family benefits or family allowances under the legislation of a Member State by virtue of the pursuit of a professional or trade activity "the right to benefits due under . . . Article 78 shall be suspended", it sets out a Community rule against the overlapping of benefits which must be interpreted within the framework of the system of the regulation and of its objectives.

As has been stated, the benefits referred to in Article 78 cover not only orphans' pensions but also family allowances, entitlement to the latter

category of benefits being acquired by reason of the existence of a dependent child and arising by virtue of the pursuit of a professional or trade activity.

It would be contrary to the objectives of the Community provisions against the overlapping of benefits in the field of social security if the grant of a benefit to one dependant could be adversely affected by a benefit paid to another dependant.

Consequently, Article 79 (3) which provides that "the right to benefits due under" Article 78 shall be suspended "if the children become entitled to family benefits or family allowances" must be interpreted to mean that the "right to benefits" must exist in favour of one and the same recipient.

That interpretation is in accordance with all the other provisions against the overlapping of benefits contained in the Community rules on social security, and in particular with Article 12 of Regulation No 1408/71, which refer exclusively to benefits of the same kind.

Furthermore, the file establishes that if the orphans in question had remained in the Federal Republic of Germany in the custody of a stepfather residing there, both the orphans' pensions on the one hand and the family allowances on the other would have been granted by the national institutions.

9 It is clear from the foregoing that the reply to the second question submitted must be that the right to the benefits referred to in Article 79 (3) of Regulation No 1408/71 is to be suspended, pursuant to the provisions of that paragraph, in order to prevent duplication of benefits only in so far as that right overlaps rights to benefits of the same kind acquired by virtue of the pursuit of a professional or trade activity.

10 The first question has thus become of purpose.

Costs

11 The costs incurred by the Italian Government 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 action are concerned, in the nature of a step in the action pending before the national court, the decision as to costs is a matter for that court.

On those grounds,

THE COURT,

in answer to the questions referred to it by the Landessozialgericht für das Land Nordrhein-Westfalen by an order of 1 September 1977, hereby rules:

The right to the benefits referred to in Article 79 (3) of Regulation No 1408/71 of the Council is to be suspended, pursuant to the provisions of that paragraph, in order to prevent duplication of benefits only in so far as that right overlaps rights to benefits of the same kind acquired by virtue of the pursuit of a professional or trade activity.

Kutscher Sørensen Bosco

Mertens de Wilmars Pescatore Mackenzie Stuart O'Keeffe

Delivered in open court in Luxembourg on 16 March 1978.

A. Van Houtte
Registrar

H. Kutscher
President

OPINION OF MR ADVOCATE GENERAL REISCHL DELIVERED ON 2 MARCH 1978 [1]

Mr President,
Members of the Court,

Both appellants in the main action, German nationals born in 1965 and 1967, moved to Belgium following the divorce of their parents and the remarriage of their mother to a Belgian national, to the home of their mother and stepfather. The stepfather has from 1 August 1972 received family benefits by reason of his employment in Belgium, that is dependent child allowances under Belgian legislation. Initially the allowance for the first child amounted to Bfrs 845.25 and for the second Bfrs 1 168.75; subsequently these sums were increased to Bfrs 3 599.50 for the first child and Bfrs 5 185 for the second child, until August 1977.

1 — Translated from the German.