OPINION OF ADVOCATE GENERAL LÉGER

delivered on 13 December 1994 *

1. Can a transitional provision of Regulation (EEC) No 1408/71 be applied to a subsequent regulation amending it? [1]

2. That, essentially, is the main question referred to this Court by the Landessozialgericht Rheinland-Pfalz.

3. Article 73 of Regulation No 1408/71, to which these proceedings relate, has given rise to several decisions of this Court to which reference should be made by way of preliminary.

4. Pursuant to Article 73(1), an unemployed person is entitled, for members of his family residing in the territory of another Member State, to the family benefits provided for by the legislation of his State of employment as though they were residing in the territory of the latter State.

5. Article 73(2), which excluded the allocation of French family benefits to workers subject to French legislation as regards the members of their family residing in the territory of another Member State, was declared invalid by the judgment of 15 January 1986 in *Pinna I.* [2] That invalidity *ab initio* [3] was applied *ex nunc* except as regards workers who, before the date of that judgment, had commenced legal proceedings or made an equivalent claim.

6. By a second *Pinna* judgment delivered on 2 March 1989, [4] the Court held that until such time as the Council adopted new rules which were in conformity with Article 51 of the Treaty, the fact that Article 73(2) of Regulation No 1408/71 had been declared invalid meant that the system for the payment of family benefits laid down in Article 73(1) of that regulation was of general application.

7. Article 60(1) of the Act of Accession of Spain and Portugal to the Commu-

* Original language: French.

1 — Council Regulation on the application of social security schemes to employed persons and their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416.

2 — Case 41/84 [1986] ECR 1.

3 — Paragraph 18 of the judgment in Case C-99/89 *Yáñez-Campoy* [1990] ECR I-4097.

4 — Case 359/87 [1989] ECR 585.

nity [5] established a transitional regime for family benefits for Spanish workers employed in a Member State other than Spain, the members of whose families resided in Spain, for the duration of which Article 73(1) would not be applicable (the worker could not therefore claim family benefits from the State of employment). That article provides that that regime would be brought to an end *upon the entry into force of the uniform solution* provided for in the (now repealed) Article 99 [6] of Regulation No 1408/71.

8. Finally, to take account of *Pinna I*, Article 73 was amended by Article 1(1) of Council Regulation (EEC) No 3427/89 of 30 October 1989 [7] which provides:

'*Employed or self-employed persons the members of whose families reside in a Member State other than the competent State.*

An employed or self-employed person subject to the legislation of a Member State shall be entitled, in respect of the members of his family who are residing in another Member State, to the family benefits provided for by the legislation of the former State, as if they were residing in that State, subject to the provisions of Annex VI.'

9. That regulation thus brought about '... a uniform solution for all the Member States to the problem of the payment of family benefits to members of the family not residing in the territory of the competent States...'. [8]

10. Pursuant to Article 3 thereof, Regulation No 3427/89 entered into force on the date of its publication (16 November 1989) and became applicable as from 15 January 1986, the date of the *Pinna I* judgment which rendered generally applicable the system for the payment of family benefits provided for in Article 73(1) of Regulation No 1408/71.

11. In its judgment in *Yáñez-Campoy*, [9] a case which was not covered *ratione temporis* by Regulation No 3427/89, [10] the Court held that that uniform solution had entered into

5 — Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and adjustments to the Treaties (OJ 1985 L 302, p. 23).

6 — That article was 'deleted' by Article 1(4) of Regulation No (EEC) No 3427/89 amending 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 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) No 1408/71 (OJ 1989 L 331, p. 1). It provided: 'Before 1 January 1973 the Council shall, on a proposal from the Commission, re-examine the whole problem of payment of family benefits to members of families who are not residing in the territory of the competent State, in order to reach a uniform solution for all Member States'. See the consolidated text of Regulation (EEC) 1408/71 (OJ 1983 L 230, p. 48).

7 — Cited above, note 6.

8 — See Decision No 145 of 27 June 1990 concerning the payment of arrears of family benefits due to self-employed persons pursuant to Articles 73 and 74 of Regulation (EEC) 1408/71 of the Administrative Commission of the European Communities on social security for migrant workers (OJ 1991 L 235, p. 1).

9 — Cited above, note 3.

10 — See paragraph 7 of the judgment.

force upon delivery of the judgment in *Pinna I*, [11] and the Court inferred that Spanish workers could rely on Article 73(1) — and therefore claim family benefits from the State of employment without reduction — as from the date of delivery of that judgment. At this point it is appropriate to draw attention to an infelicity in the drafting of the *Yáñez-Campoy* judgment. Deriving from the invalidity *ab initio* of Article 73(2), the uniform solution has existed since the entry into force of Regulation No 1408/71 and therefore, for Spanish nationals, as from *1 January 1986*, the date on which that regulation entered into force on Spanish territory. However, the Court limited the *availability* in time of Article 73 to the date of the *Pinna I* judgment, namely 15 January 1986, except in the case of applications lodged before that date.

12. It is therefore established that a Spanish national working in a Member State other than Spain, whose family resides in the latter State, is entitled to the payment of family benefits from the State of employment as from 15 January 1986, either under Article 3 of Regulation No 3427/89 or by virtue of the judgment in *Yáñez-Campoy*.

13. A question remains upon which the latter regulation is silent: within what period must an insured person lodge his application for the payment of arrears? After what period does his right of action become time-barred?

14. That is the essential issue in this case, the factual background to which is as follows:

15. Mr Alonso-Pérez, a Spanish national, the plaintiff in the main proceedings, has worked as an employed person in the Federal Republic of Germany since 1970. [12] His wife and two minor daughters live in Spain.

16. On 12 July 1989, the Arbeitsamt Koblenz awarded him [13] family benefits with retroactive effect to a date six months prior to his application (application lodged in April 1989, arrears paid from October 1988), pursuant to paragraph 9(2) of the Bundeskindergeldgesetz.

17. On 27 May 1991, Mr Alonso-Pérez lodged a further application, seeking arrears of family benefits for the period from 1 January 1986 to 30 September 1988, relying on Article 1(1) of Regulation No 3427/89, which applied *ratione temporis* to his case.

18. That regulation contains no provision limiting the period within which an insured person may take proceedings to secure the

11 — Cited above, note 2.

12 — See the observations of the plaintiff in the main proceedings, page 1.

13 — In response to an application lodged in April 1989.

payment of arrears of family benefits as from the date of acquisition of his new rights.

19. The plaintiff in the main proceedings maintains that that lacuna should be supplied by the analogous application of Article 94(6) of Regulation No 1408/71, with the result that that period would be two years. The starting point of that period would be 16 November 1989, the date of publication of Regulation No 3427/89, failing which 13 November 1990, the date on which the judgment in *Yáñez-Campoy* was delivered.

20. The Bundesanstalt für Arbeit rejected the application for payment of arrears of family benefits for the period from 1 January 1986 to 30 September 1988 and its decision was confirmed by the Sozialgericht, Koblenz on 15 October 1992. In appeal proceedings brought by Mr Alonso-Pérez, the Landessozialgericht Rheinland-Pfalz has referred the following question to the Court for a preliminary ruling:

'Does Article 1(1) of Council Regulation (EEC) No 3427/89 ... provide a basis for entitlement to family allowances in respect of periods prior to the application for family allowances and in particular, with effect from January 1986, in respect of children of employed persons living in another Member State, in the case where the application for family allowances was made on or before 16 November 1991?'

21. That question falls into two subquestions, between which a clear distinction must be drawn.

22. The first concerns the retroactive effect of the application for arrears of family benefits. It was dealt with by Regulation No 3427/89 and by the judgment in *Yáñez-Campoy* which fixed the earliest date for the retroactive effect of applications for arrears as 15 January 1986, the date on which the uniform solution provided for in Article 99 of Regulation No 1408/71 became applicable. [14]

23. Before that date, Spanish nationals had no other rights than those laid down in the Convention on social security between Germany and Spain of 4 December 1973.

24. The second question is much more delicate: what period is available to a Spanish insured person to lodge his application for the payment of arrears? After what period is his right to institute proceedings for payment time-barred?

25. *The point at issue is thus not so much the period of retroactive effect as the period within which retroactivity can be invoked.*

14 — See above, paragraph 7 et seq.

26. Article 94(4) and (6) of Regulation No 1408/71 provide:

'(4) Any benefit which has not been awarded or which has been suspended by reason of the nationality or place of residence of the person concerned shall, on the application of the person concerned, be awarded or resumed with effect from 1 October 1972 or the date of its application in the territory of the Member State concerned provided that the rights previously determined have not given rise to a lump sum payment.

...

(6) If an application referred to in paragraph 4 or 5 is submitted within two years from 1 October 1972 or from the date of its application of the territory of the Member State concerned, [15] the rights acquired under this regulation shall have effect from that date, and the provisions of the legislation of any Member State concerning the forfeiture or limitation of rights may not be invoked against the person concerned.'

27. By the combined application of Article 2 [16] and Article 60 of the Act concerning the conditions of accession of the Kingdom of Spain and the Portuguese Republic and the adjustments to the Treaties [17] and Article 2(2) of the Council Decision of 11 June 1985, [18] Regulation No 1408/71 partially entered into force in Spanish territory on 1 January 1986. Article 94(6) was among the provisions that came into force.

28. Applications to enforce rights becoming available under the regulation had to be submitted within two years from 1 October 1972 for the original Member States of the Community. Similarly, such applications had to be submitted within two years after 1 January 1986 in the case of the Kingdom of Spain.

29. It follows that, by virtue of that article, Spanish nationals were vested, for two years from 1 January 1986, with a right to bring proceedings for payment or review of their rights on the basis that *account would be taken of the new rights made available by Regulation No 1408/71.*

15 — This phrase was added to the original text (which read 'within two years from the date of entry into force of this regulation') when the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland acceded to the Community (see the Act concerning the conditions of accession and amendments to the Treaties — OJ 1972 L 73, p. 14).

16 — Which provides: 'From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions of the Communities 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'.

17 — The Act annexed to the Accession Treaty signed on 12 June 1985 (OJ 1985 L 302, p. 9).

18 — Decision of the Council of the European Communities of 11 June 1985 on the accession of the Kingdom of Spain and the Portuguese Republic to the European Coal and Steel Community (OJ 1985 L 302, p. 5). Pursuant to that article, accession takes effect on 1 January 1986.

30. We have seen (1) that Article 73 of that regulation grants employed and self-employed persons the right to family benefits from the State of employment for the members of their families residing on the territory of another Member State, and (2) that, in the case of Spanish workers employed in a Member State other than Spain, the members of whose families reside in Spain, that right does not arise until the date of adoption of a uniform solution, namely 15 January 1986.

31. The entry into force of Article 73 within Spanish territory was therefore delayed until that date.

32. We should conclude from this that, with effect from that date, Spanish nationals had a period of two years in which to bring proceedings for the payment of arrears of family benefits.

33. That would certainly have been the case if the Spanish workers had, on that same day, been aware of the new rights conferred on them on 15 January 1986.

34. However — and this is the most delicate aspect of this case — that right was not *established*, and therefore was not brought to the notice of the persons concerned, until Regulation No 3427/89 came into force and the *Yáñez-Campoy* judgment was delivered.

35. In those circumstances, is it possible to accept application by analogy of Article 94(6), whereby the period of two years runs not from 15 January 1986 but *from the date on which it actually became possible for Spanish nationals to enforce their rights?*

36. For the sake of clarity, it is appropriate to distinguish between the conditions for the application of that provision to Community nationals other than Spaniards, on the one hand, and, on the other, to Spaniards.

A — *The application of Article 94(2) of Regulation No 1408/71 to Community nationals other than Spaniards*

37. For such persons, the application for payment of arrears of family benefits is based not on Article 73 of Regulation No 1408/71, as initially drafted, but on Article 1 of Regulation No 3427/89 which amended it.

38. Article 94(6) of the first regulation, which appears in 'Title VII — Transitional and final provisions' cannot be regarded as a transitional provision applicable to Regulation No 3427/89, which also contains transitional provisions and makes no reference

whatsoever to that article. [19] It will be observed that that regulation amends certain transitional provisions of Regulation No 1408/71, such as Article 94(9), and leaves Article 94(6) unchanged. The latter article does not govern the changes subsequently made to Regulation No 1408/71 by regulations which contain their own transitional conditions.

39. It is not therefore *a priori* possible to 'resuscitate' Article 94(6) so as to create, for two years, renewed entitlement to family benefits by virtue of *rights made available by another regulation.*

40. Furthermore, even if Article 94(6) of Regulation No 1408/71 could be combined with Regulation No 3427/89, and invoked with that regulation, it is not applicable by analogy here.

41. *Ratione materiae*, Article 94(6) provides for a period of two years for an application to be lodged for review of pensions determined before 1 October 1972 (Article 94(5)) or for payment of the benefits claimable by insured persons as from 1 October 1972 (Article 94(6)), *by virtue of the new rights conferred by that regulation.*

42. However,

(1) since *Pinna I*, as interpreted by *Pinna II*, the system of paying benefits provided for in Article 73 of Regulation No 1408/71 is of general application. Consequently, Article 1(1) of Regulation No 3427/89 *does not create new rights* for Community nationals. They could, even before the entry into force of that regulation, rely on Article 73 (since 15 January 1986 for those employed on French territory, [20] and since the entry into force of Regulation No 1408/71 for the others);

(2) that regulation contains no provisions similar to Article 94(4) and (6) for the simple reason that it does not change the substantive rights of insured persons who could already rely upon Article 73.

43. In order for the system to be consistent, therefore, there can be no transitional provi-

19 — See, to that effect, paragraph 16 of the German Government's observations.

20 — See the judgments in *Pinna I* and *II* mentioned in paragraphs 5 and 6 hereof.

sion in Regulation No 3427/89 similar to Article 94(6).

B — *The application of Article 94(6) of Regulation No 1408/71 to Spaniards*

44. The entire difficulty lies, here, in the fact that it was only upon the entry into force of Regulation No 3427/89 (16 November 1989) and delivery of the judgment in *Yáñez-Campoy* that Spanish nationals learned that they had been entitled to rely on Article 73 of Regulation No 1408/71 *since 15 January 1986* and that Regulation No 3427/89 did not take account of their specific situation.

45. In my opinion, it cannot be contended that Spanish nationals could (and should) have inferred from *Pinna I* that a uniform solution had existed since that date. The *Pinna II* judgment was needed to settle that question. Moreover, pursuant to the now repealed Article 99 of Regulation No 1408/71, that solution had to take the form of a measure adopted by the Council. It was thus not until the entry into force of Regulation No 3427/89 (which refers to that article [21]) that they knew for certain that they had been entitled to rely on Article 73 since 15 January 1986. [22]

46. On 1 January 1989, on which date the transitional period laid down in Article 60 of the Act of Accession expired, Spaniards became entitled to call for the application of Article 73 *without thereby having any right to claim any retroactive effect as from 15 January 1986.*

47. Thus, before the entry into force of Regulation No 3427/89, Spanish nationals had never been entitled to claim the benefit of Article 73 *with effect from 15 January 1986* or — therefore — of the transitional provisions of Regulation No 1408/71 which applied to the latter article. That was why, before that date, the plaintiff in the main proceedings did not seek payment of family benefits in excess of six months' arrears. He was unaware that he could go back as far as 15 January 1986.

48. Since Spanish nationals were never entitled to rely on Article 73 with retroactive effect to 15 January 1986 before the entry into force of Regulation No 3427/89, [23] that regulation creates *new rights* for their benefit. Is it not therefore legitimate to grant the benefit, by analogy, of the transitional provisions which were available to the other Community nationals since the date on which Regulation No 1408/71 entered into force or the date of the *Pinna I* judgment?

21 — First recital in the preamble.

22 — It will be remembered that the *Yáñez-Campoy* judgment is based solely on the *Pinna I* judgment and not on Regulation No 3427/89, because the latter was adopted in the course of those proceedings.

23 — By virtue of Article 60(1) of the Act of Accession, Article 73 could be relied on as from 1 January 1989 (see paragraph 46 above). Spanish nationals nevertheless were unaware, until the adoption of Regulation No 3427/89, that that article applied with retroactive effect from 15 January 1986.

49. As we have seen, the right provided for in Article 73 of Regulation No 1408/71 became available to Spanish nationals as from the adoption of the uniform solution, *that is to say with effect from 15 January 1986*.

50. However, that right was not *established* or *disclosed* until (1) the entry into force, on 16 November 1989, of Regulation No 3427/89, which allows Article 73 to be applied without condition as to nationality to all Community nationals with effect from 15 January 1986, (2) the judgment in *Yáñez-Campoy* which vests Spanish nationals with the right to benefit from Article 73 as from 15 January 1986.

51. Having been vested with that right since 15 January 1986, Spanish nationals were only able to enforce that right retroactively with effect from 16 November 1989 at the earliest.

52. By then, Article 94(6) had ceased to be directly applicable since 1 January 1988, that is to say two years after the entry into force of Regulation No 1408/71 on Spanish territory.

53. It would have been applicable if Spaniards had known, since 15 January 1986, that they could invoke Article 73.

54. As stated, if Regulation no 3427/89 contains no equivalent of Article 94(6), that is because it does not create new rights and confirms a pre-existing situation. However, as far as Spaniards are concerned, it establishes a right to retroactive effect which had not previously been brought to their notice.

55. Thus, Spaniards would have been in the same situation if the right to family benefits *with effect from 15 January 1986*, in the State of employment, had been *created* by Regulation No 3427/89.

56. Since that regulation takes no specific account of Spaniards, I consider that analogous reasoning should be applied to Regulation No 1408/71.

57. All Community nationals other than those working in France and Spain enjoyed family benefits from the State of employment as from the date of entry into force of Regulation No 1408/71 and had a period of two years as from that date to bring proceedings for payment of arrears, without any possibility of being frustrated by national limitation periods. In the case of French family benefits, a period of two years for bringing proceedings for the payment of arrears was fixed by Decision No 143 of the Administrative Commission of the European Com-

munities on social security for migrant workers as from 1 April 1990. [24]

58. Similarly, Spanish nationals must be able to bring proceedings to secure payment of arrears of family benefits within a period of two years as from the day on which the retroactive applicability, of Article 73, as from 15 January 1986, was brought to their notice, namely on 16 November 1986. Otherwise, Spanish nationals would be vested with a right which it was impossible to exercise.

59. That, moreover, is the purport of Decision No 145 of 27 June 1990 of the Administrative Commission of the European Communities on social security for migrant workers concerning the payment of arrears of family benefits due to self-employed persons pursuant to Articles 73 and 74 of Regulation (EEC) No 1408/71, [25] Article 3 of which provides:

'With regard to the payment of arrears of family benefits, if the application referred to in paragraph 1 is submitted within two years of 16 November 1989, the rights provided under Regulation (EEC) No 3427/89 shall be acquired and the provisions of the legislation of any Member State relating to the lapse or barring of the rights may not be applied to the persons concerned.'

60. There is, it seems to me, a twofold basis for this possibility of, so to speak, 'reviving' Article 94(6) of Regulation No 1408/71.

61. In order to ensure the effectiveness of retroactivity, the insured person must have a sufficient period in which to take action.

62. By virtue of the principle of non-discrimination, the same social advantages must be granted to all Community nationals under the same conditions, without distinction based on nationality. That was already the position by virtue of the judgment in *Pinna I*. It also followed from Regulation No 3427/89, which draws no such distinction as between workers.

63. Consequently, as between, on the one hand, a situation in which a period of two years is allowed for proceedings to be commenced and retroactivity may be claimed as from the creation of the right on 15 January 1986, and, on the other, a situation where proceedings to secure payment under national procedural law are not subject to a time-limit for commencement but the retroactive effect of the application is limited to six months, the former must take precedence.

24 — Decision of 9 April 1990 concerning the payment of arrears of French family benefits due to employed persons in pursuance of Articles 73 and 74 of Regulation (EEC) No 1408/71 (OJ 1990 C 252, p. 10).

25 — Cited above, note 8.

64. In conclusion, I suggest that the Court rule as follows:

Community law, and in particular Article 94(6) 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, precludes the application of a rule of national law, such as that contained in paragraph 9(2) of the Bundeskindergeldgesetz, which limits to six months the retroactive effect of an application for family benefits lodged by a worker established in Germany whose children reside in Spanish territory, where the person concerned based his application on Council Regulation (EEC) No 3427/89 of 30 October 1989 amending 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 and Regulation (EEC) No 574/72 laying down the procedure for implementing Regulation (EEC) 1408/71, where he did so before 16 November 1991, where the right to such benefits was awarded to him as from 15 January 1986 and where he had notice of such retroactive effect only by virtue of Regulation (EEC) No 3427/89.