OPINION OF ADVOCATE GENERAL COSMAS

delivered on 25 September 1997 *

I — Introductory remarks

1. In this case the Court is asked to answer three questions referred to it by the Bundessozialgericht (Federal Social Court) for a preliminary ruling pursuant to Article 177 of the EC Treaty. Those questions are concerned with the interpretation and application of Community law, in particular Articles 48 and 51 of the EC Treaty and Articles 6 and 78 of Regulation No 1408/71 [1] ('the Regulation').

II — Legal context

2. Article 6 of the Regulation provides:

'Subject to the provisions of Articles 7, 8 and 46(4), this Regulation shall, as regards persons and matters which it covers, replace the provisions of any social security convention binding either:

(a) two or more Member States exclusively; or

(b) at least two Member States and one or more other States, where settlement of the cases concerned does not involve any institution of one of the latter States.'

3. Article 78 of the Regulation states:

'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 except those granted under insurance schemes for accidents at work and occupational diseases.

* Original language: Greek.

1 — Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community (OJ, English Special Edition 1971 (II), p. 416), as amended and consolidated by Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

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:

(a) for the orphan of a deceased employed or self-employed person who was subject to the legislation of one Member State only in accordance with the legislation of that State;

(b) for the orphan of a deceased employed or self-employed person who was subject to the legislation of several Member States:

(i) in accordance with the legislation of the Member State in whose territory the orphan resides provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), a right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State, or

(ii) in other cases in accordance with the legislation of the Member State to which the deceased had been subject for the longest period of time, provided that, taking into account, where appropriate, the provisions of Article 79(1)(a), the right to one of the benefits referred to in paragraph 1 is acquired under the legislation of that State; if no right is acquired under that legislation, the conditions for the acquisition of such right under the legislations of the other Member States shall be examined in decreasing order of the length of periods of insurance or residence completed under the legislation of those Member States.

However, the legislation of the Member State applicable in respect of provision of the benefits referred to in Article 77 for a pensioner's children shall remain applicable after the death of the said pensioner in respect of the provision of the benefits to his orphans.'

4. Article 79(1) of the Regulation is in the following terms:

'1. Benefits, within the meaning of Articles 77 and 78, shall be provided in accordance with the legislation determined by applying the provisions of those Articles by the institution responsible for administering such legislation and at its expense as if the pensioner or the deceased had been subject only to the legislation of the competent State.

However:

(a) if that legislation provides that the acquisition, retention or recovery of the right to benefits shall be dependent on the length of periods of insurance, employment, self-employment or residence such length shall be determined taking into account, where appropriate, the provisions of Article 45 or, as the case may be, Article 72;

(b) ...'.

III — Facts

5. Gregorio Gómez Pérez, a Spanish national and father of the appellants on a point of law before the national court ('the appellants'), had completed periods of insurance as an employed person of 56 months in Germany and 80 months in Spain. He died in Spain in February 1985 without having drawn a pension. As is apparent from the order for reference, by decision of 23 August 1988 the competent German social security institution (Landesversicherungsanstalt (Regional Insurance Office) Rheinprovinz) granted the children of the deceased, Manuela Gómez Rodríguez and Gregorio Gómez Rodríguez, pensions for the period from 7 February 1985 to 31 December 1985 as members of the family of the insured person, pursuant to the Convention between Germany and Spain on social security of 4 December 1973 as amended by the supplementary Convention of 17 December 1975. At the same time it informed them that, in accordance with Articles 77 and 78 of the Regulation, the Spanish social security institution was responsible for the grant of orphans' benefits from 1 January 1986. That institution granted the appellants orphans' pensions until each of them reached 18 years of age (that is to say until 31 July 1987 and 31 March 1986 respectively). The age-limit of 18 is that laid down by Spanish social security legislation for entitlement to orphans' pension. Subsequently, Manuela and Gregorio Gómez Rodríguez, pointing out that they were continuing their studies, applied for orphans' pensions from the German social security institution under German social security law, which provides that payment of social security benefits for orphans is to be extended up to the age of 25 years where, *inter alia*, the orphan is continuing his studies (Paragraphs 1263 and 1267 of the Reichsversicherungsordnung (National Social Insurance Code; 'the RVO')). That application was refused on the ground that, after the benefits ceased to be granted by the Spanish social security institution, there was no entitlement under the Community provisions to orphans' benefit from the German social security institution because the conditions for the acquisition of entitlement to benefit under German law alone were not met. The reason was that, under Paragraph 1263(2) of the RVO, orphans' pensions are granted only if the deceased was drawing a pension at the time of his death or if at that time the period of insurance required for a pension on grounds of incapacity to work has been completed or, under Paragraph 1252 of the RVO, is deemed to have been completed (for example, incapacity for work or death as a result of an accident at work). Since the deceased had not

completed the minimum period of insurance of 60 months laid down by German law (Paragraph 1246(2) of the RVO) and did not fall within any of the other above cases, the orphans could not obtain a pension under German law. The objection lodged by them against that refusal was unsuccessful, as was their action and appeal, and they brought their dispute with the competent German social security institution before the Bundessozialgericht. That court was unsure whether the appellants' claim to a pension from the German social security institution could be founded on Articles 78 and 79 of the Regulation or even on the abovementioned Convention between Germany and Spain. It therefore referred the following questions to the Court for a preliminary ruling:

IV — Questions referred for a preliminary ruling

'1. Is Article 78(2)(b) of Regulation (EEC) No 1408/71 to be interpreted as meaning that the provision contained therein for determining the legislation applicable for the grant of benefits is to apply permanently even if the right to orphans' pension initially arose in the Member State which is competent thereunder (in this case the State of residence) but has subsequently been lost by reason of the attainment of an age-limit, while in another Member State, whose legislation was also applicable to the insured person, a right to orphans' pension would run beyond that date on application of Article 79 of Regulation (EEC) No 1408/71, or is there in such a case a change in the legislation applicable in accordance with Article 78(2)(b)(ii) of the regulation?

2. Does the expectation of continuing to receive orphans' pension already granted by a Member State under a convention concluded between two Member States and transposed into national law for a longer period (for example in the case of education or vocational training extending beyond the completion of the 18th year) than the orphans' pension which is to be granted pursuant to the legislation of another Member State, applicable under Article 78(2)(b) of Regulation (EEC) No 1408/71, constitute one of the social security advantages which orphans must not lose by virtue of the fact that the said convention has been rendered inapplicable by the entry into force of Regulation (EEC) No 1408/71?

3. If Question 2 is answered in the affirmative: Can orphans who were already entitled, before Regulation (EEC) No 1408/71 came into force, to orphans' pensions under the law of a Member State in pursuance of a social security convention concluded between two Member States again rely on

that entitlement when a right to a benefit originally conferred by the legislation of another Member State which was applicable under Article 78(2)(b) of Regulation (EEC) No 1408/71 no longer exists?'

V — Substance

6. As I will explain below (see point 42 et seq.), bilateral social security conventions predating the Regulation continue under certain conditions to produce effects even after the Regulation has entered into force, if their provisions are *more favourable* for workers or their dependants than the Regulation. I will therefore begin by examining the first question referred for a preliminary ruling, which raises the issue of whether the appellants' claim may be founded on the provisions of the Regulation. I will then consider the second and third questions, which relate to the possibility of applying in this case the abovementioned Convention between Germany and Spain.

A — *Question 1*

7. By this question, the referring court essentially wishes to ascertain whether, after the obligation to grant orphans' pension to children of migrant workers, imposed on the State where the orphans reside, has come to an end, that obligation can, solely on the basis of the rules on aggregation laid down in Articles 78(2)(b)(ii) and 79(1)(a) of the Regulation, pass to another Member State where their deceased father had completed a number of periods of insurance, but not enough for a pension to be granted under the legislation of that State alone.

8. In their observations submitted to the Court, the German and Austrian Governments state that Article 78(2)(b) of the Regulation must be interpreted as determining the applicable national legislation definitively and that, if and when the social security entitlement acquired under that legislation comes to an end, an insured person cannot become subject to the legislation of another State. According to the German Government, the opposite interpretation is inconsistent with the will of the Community legislature, as expressed in the Council minutes of the discussions concerning the draft of the provisions of the Regulation which are at issue. The German Government also points out that the solution put forward by it is the only one which is conceivable in practice. If the contrary applied, Germany would frequently be called on to grant unjustified social security benefits, whenever the social security legislation of the orphan's State of residence no longer accorded him an entitlement to benefits. Germany would thus generally be called on to pay additional social security benefits which would, moreover, be higher than those paid by the States of residence. In the opinion of the German Government, the will of the Community legislature is that, in order to avoid such problems,

there is no change in the national social security institution responsible for the payment of benefit from the moment when the relevant institution of the State of residence has stopped paying the social security benefits in question; otherwise the exception would end up becoming the rule.

9. The Austrian Government holds the same view. It notes, first, that the coordination of rules undertaken by the Regulation is not only prompted by the principle of integration but also seeks to strengthen the application of that principle, under which only the State of residence is responsible for the payment of pension benefits to orphans. Any other approach to interpretating the provisions of the Regulation which are at issue would directly infringe that principle. In particular, if it were accepted that a Member State was obliged to pay orphans' benefits even after the expiry of the right to a pension from the Member State which had initially been judged responsible for the payment of the benefits under the principle of integration, we would end up with the result that the Member States which have laid down the highest age-limit for entitlement to orphans' pension would always, in the final analysis, be the States responsible for payment of the benefits, irrespective of the orphans' place of residence and of the length of the periods of insurance completed by the insured person in the various Member States. By contrast, the Member States which have laid down low age-limits would in practice be released from the obligation to pay. In other words, the criteria of the recipient's residence and of the number of the periods of insurance completed by the insured person, on which the scheme of the Regulation is in principle based, are both called into question.

10. Precisely the opposite interpretation is put forward by the appellants, the Spanish, Greek and Swedish Governments and the Commission. According to that interpretation, it follows from Article 78(2)(b)(ii) of the Regulation that the competence of the social security institution of the Member State within which the deceased completed periods of insurance and the orphans do not reside cannot be excluded merely because initially a social security body of another Member State — that is to say, in this case, of the Member State where the orphans reside — was competent and had paid benefits. Otherwise, the principles of freedom of movement for persons and of equal treatment would be infringed by the mere fact that an orphan resident in Spain would be entitled to benefits for a shorter period than if he were to choose Germany as his place of residence.

11. It must first be noted that the purpose of Article 78 is 'to define the legislation under which orphans' benefits must be granted', [2] that is to say it is intended to determine the legislation applicable to the benefits in question, which, in accordance with Article 79(1), is one and exclusive (principle that the

2 — Case 115/77 *Laumann* v *Landesversicherungsanstalt Rheinprovinz* [1978] ECR 805, paragraph 7.

legislation of a single Member State only is to apply).

12. The criterion for ascertaining the applicable legislation where, as in this case, a worker was subject to the legislation of several Member States, is the orphan's place of residence if the right to one of the benefits covered by Article 78(1), which include orphans' pension, is acquired under the law of that country. If the right to one of the abovementioned benefits is not acquired under that law because the worker did not complete the periods of insurance laid down by it for the acquisition of entitlement to benefits, under Article 79(1)(a) — to which Article 78(2)(b)(i) expressly refers — the periods of insurance completed by the worker under the legislation of another Member State are added on as far as necessary, in accordance with the specific provisions in Article 45 or Article 72 of the Regulation, to which Article 79(1)(a) refers.

13. If no entitlement to benefit is acquired under Article 78(2)(b)(i), the first limb of Article 78(2)(b)(ii) provides that the legislation of the Member State to which the worker had been subject for the longest period of time is applicable; the periods of insurance completed by him in another Member State are added on where necessary. [3]

14. Finally, where no entitlement to benefit is established under that provision either, the second limb of Article 78(2)(b)(ii) provides that the conditions for the acquisition of entitlement under the legislation of the other Member States are to be examined in decreasing order of the length of periods of insurance or residence completed under their legislation.

15. It is true that that second limb of Article 78(2)(b)(ii) does not expressly refer to the aggregation provisions in Article 79(1)(a). However, as the Commission correctly points out, that omission must be ascribed to reasons of textual economy and the avoidance of repetition. Article 79(1)(a) has in fact already been referred to twice when defining the means of ascertaining the applicable legislation, and a third reference to it would be superfluous since it is self-evident. Besides, there is no substantive reason for allowing aggregation when the orphan's State of residence or the State where the worker had completed the most periods of insurance is at issue and for excluding it when the State where fewer periods of insurance had been completed is at issue.

3 — That is to say, as I have explained in the previous point, where the worker may not have completed the minimum number of periods of insurance required by the legislation of that State for the acquisition of social security entitlement.

Moreover, that result would be contrary to the objective of the Community legislature. The wording of Article 78(2)(b) in fact clearly shows the concern of the Community legislature that all the means made available by Community law should be used in order to avoid orphans' being denied any benefit because the deceased worker may not have completed the periods of insurance required in order for the legislation of a single Member State to apply to him. [4]

16. It is necessary, however, to take into account that the provisions of Article 78 are mandatory and must be applied uniformly within the Community. By those provisions, the Community legislature prevented the Member States from determining as they think fit the national legislation applicable in each case. [5] The same applies all the more to persons entitled to benefits, who thus cannot choose for themselves the legislation to which they will be subject.

17. Furthermore, it follows from the relationship between the provisions in Article 78(2)(b) that each of the three cases is independent and must not be confused with the previous or subsequent one, and that the order in which they are to be applied is mandatory. Thus, in order for the second or the third case to apply, the immediately preceding case must have been fully considered and have proved inapplicable. It follows that the criteria linked to the application of each case are to be taken into account within the framework of the relevant case, in the appropriate order, and that the criteria for the different cases are not to be confused.

18. Let us now turn to the question whether the determination of the applicable legislation under Article 78(2) is definitive or can be altered and, if so, under what conditions.

19. The fact that the applicable legislation is one and exclusive does not mean that it is determined definitively and immutably. Article 78(2) refers to the 'grant' of orphans' benefits, which takes place subject to certain conditions of law and of fact. The legal conditions are laid down partly by national law and partly by Community law, while the factual conditions are linked to the personal situation of the person concerned and, generally, to the facts of a particular case.

Accordingly, the question as to the applicable legislation is raised substantively whenever a social security benefit is to be granted;

4 — It is characteristic that, under the second limb of Article 78(2)(b)(ii), 'periods of residence' are, in the absence of periods of insurance, sufficient for entitlement to benefits to be acquired. Similar sensitivity on the part of the Community legislature is apparent from the corresponding provisions of Article 77(2)(b), which is concerned with benefits paid to dependent children of pensioners.

5 — Cf. Case 276/81 *Sociale Verzekeringsbank* v *Kuijpers* [1982] ECR 3027, paragraph 14.

it must also be taken into account that, in accordance with general principle, the relevant time for defining the conditions of law and of fact governing entitlement to benefits is when the benefits are granted.

Thus, where the conditions of law and of fact under which the benefit was granted remain the same, the question of a change in applicable legislation under Article 78(2) is, in principle, not raised. However, where the conditions of law and of fact under which a benefit was granted have changed in the meantime, the question of the applicable legislation under Article 78(2) may be raised. In other words, the applicable legislation under Article 78(2) remains the same where the relevant conditions of law and of fact under which the benefit was granted remain unchanged.

20. An example of a change of legal regime entailing a change in the applicable legislation is the amendment of Article 42 of Regulation No 3, [6] under which the State in which the deceased had worked was liable to pay orphans' benefits, by Article 1 of Regulation No 1/64. [7]

As amended, Article 42(6)(b) of Regulation No 3 contains provisions similar to those of Article 78(2)(b) of Regulation No 1408/71, that is to say responsibility for the grant of benefits rests with the orphan's State of residence. As is usual in such cases, a transitional provision, Article 4 of Regulation No 1/64, dealt with the issues of a transitional nature arising from the change.

21. The same occurs when the system set up under a regulation is replaced in its entirety by a new regulation; here too, provisions generally deal with the transitional issues which arise, with the criterion that rights acquired under the previous regime should be protected. Thus, for example, under Article 94(5) of Regulation No 1408/71, which expressly also applies to benefits referred to in Article 78, the rights of a person to whom a pension was awarded prior to the entry of the Regulation into force, namely 1 October 1972, or, as the case may be, prior to the date of its application in the territory of the Member State concerned (in this case 1 January 1986, when Spain acceded to the EEC) may, on the application of the person concerned, be reviewed, in accordance with the provisions of the new regulation. [8]

6 — Journal Officiel 1958, p. 561.

7 — Journal Officiel 1964, p. 1.

8 — However, a new fact affecting entitlement to benefit which arose when the new regulation applied, such as a change in the personal situation of the recipient, will be assessed in accordance with the provisions of the new regulation (see Case 83/87 *Viva* v *FNROM* [1988] ECR 2521).

22. The same solution must also apply where a bilateral social security convention in force is replaced by a regulation, a situation which is of particular interest in this case. It is clear that Regulation No 1408/71, unlike the previously applicable Regulation No 3 which, in Article 41, dealt with the transitional issues arising from the repeal of prior bilateral conventions, does not deal with the problem specifically and completely. However, since Article 94 is formulated in general terms, it must also be considered to cover cases where rights had previously been acquired on the basis of bilateral conventions.

That interpretation is also confirmed by the wording of Article 94(9) which makes specific provision in respect of rights derived from bilateral conventions signed by France. It follows *a contrario* that rights under bilateral conventions signed by the other Member States are governed in the future by the general provisions of Article 94 in conjunction, as regards orphans' benefits, with those of Article 78.

23. For that reason, it seems, the German social security body, which, as already stated (see point 5 above), was initially responsible on the basis of the Convention between Germany and Spain for the grant of pensions to the appellants, was freed from that obligation from the date of Spain's accession to the EEC (and, therefore, the date on which the Regulation also entered into force in Spain), with the result that the Spanish social security body became responsible. Here, therefore, the change in the legal regime governing the social security relationship may entail a change in the legislation applicable to the grant of benefits. [9]

24. As regards the conditions of fact under which benefits are granted, a change in which may lead to an alteration in orphans' entitlement to benefit, reference must be

9 — If, as I have already explained, the transitional arrangements are laid down in that case by Article 94 of the Regulation, the Commission rightly wonders in its written observations what the legal basis was for the change of competence as regards the grant of pensions to the appellants. As I have stated in the previous point, under Article 94(5) rights which had already been awarded before the Regulation applied, as in this case, may be reviewed *only* on the application of the person concerned. The Court, interpreting that provision, has held that the right to a review may in principle be exercised only by the person concerned and to his advantage and that the competent institution of a Member State is not entitled to substitute itself for the insured person in the exercise of his rights (Case 32/76 *Saieva* v *Caisse de Compensation des Allocations Familiales* [1976] ECR 1523, paragraph 18, and *Viva*, cited above, paragraph 10). However, the Court held in *Viva*, at paragraph 11, that that principle does not apply to situations which entail *automatically* a new determination of rights to benefits, as in the case of a change in the personal situation of the person concerned which occurs after the repeal, in accordance with Article 100 of the Regulation, of the previous regulation under which the right had been determined. I consider that, by analogy, the replacement of a bilateral convention by a regulation constitutes a ground for automatically reviewing rights to benefits, in accordance with the new provisions regarding competence and applicable legislation in Article 78, irrespective of whether the person concerned submitted an application in that regard. Thus, the German social security body correctly granted pensions for the period when it was competent in accordance with the Convention between Germany and Spain and, furthermore, correctly referred the case to the Spanish social security body competent for the period thereafter.

made to Article 92 of Regulation No 574/72, [10] which provides as follows:

'Any person to whom benefits are paid under Article 77 or 78 of the Regulation for a pensioner's children or for orphans, shall inform the institution responsible for the payment of such benefits:

— of any change in the situation of the children or orphans that is likely to alter the entitlement to benefits,

— of any modification in the number of children or orphans in respect of whom benefits are due,

— of any transfer of residence of the children or orphans,

— of any pursuit of a professional or trade activity giving entitlement to family benefits or family allowances for such children or orphans.'

25. Changes in the above conditions may lead to the redetermination of benefit entitlement under the applicable legislation, but possibly also to a change in the applicable legislation. Thus, where the worker had been subject to the legislation of at least two Member States a change in the orphan's residence entails a change in the applicable legislation. [11]

26. A change in the personal situation of the person entitled to the benefits (first indent) may, first of all, lead to the decision granting benefit being reviewed under the applicable legislation. [12]

27. An orphan's attaining the age of majority without doubt constitutes a change in personal situation affecting entitlement to

10 — As consolidated by Regulation No 2001/83.

11 — That is implicitly considered to be the case whenever families or orphans who have returned to their place of origin seek a benefit *supplement* from the State to whose legislation the worker had been subject and which grants higher benefits. The very term 'supplement' which, according to the case-law of the Court, corresponds to the difference between the benefits actually paid in the State of residence and those to which the recipients would be entitled under the legislation of the State which grants the higher benefits, presupposes that, by reason of the move to the State of residence, the legislation of that State is henceforth applicable.

12 — As, for example, the change in status from 'married' to 'unmarried' on the death of a spouse (see *Viva*, cited in footnote 8).

benefits. Thus, in Spain the pension ceases when the age of majority of 18 is reached. In Germany payment of orphans' pension also ceases, in principle, at the same age. However, in Germany studying constitutes a further change in personal situation justifying the recovery or retention of entitlement to benefits. That is because, under German law, if an orphan continues his studies, a pension continues to be paid until he reaches 25 years of age. [13]

The question, therefore, is whether the combination of having reached the age of majority and of studying, which under Spanish law automatically means that the pension ceases to be paid, may result in a change of applicable legislation in accordance with Article 78(2) of the Regulation.

28. The appellants, the Spanish, Greek and Swedish Governments and the Commission, broadly rely on the well-known case-law of the Court in *Laterza*, [14] *Gravina*, [15] *D'Amario* [16] and *Athanasopoulos* [17] and state that the question must be answered in the affirmative, in accordance with Article 78(2)(b)(ii) of the Regulation.

29. It should be noted first of all that in the abovementioned case-law the Court cut into the principle, laid down in Articles 77 and 78 of the Regulation, that the legislation of a single Member State only should apply. In that case-law the Court interpreted the Regulation in the light of Article 51 of the Treaty, which seeks to guarantee freedom of movement for migrant workers, and held that Article 78(2)(b)(i) and Article 77(2)(b)(i) could not take away or reduce, in the State of residence, social security entitlements previously acquired in another Member State and that, where the benefits actually paid to the recipient in the State of residence were lower than the benefits which he would have received in the other Member State, whose benefits were more favourable, he was entitled to receive from the second Member State a benefit supplement equal to the difference between the two benefits.

However, as the German Government correctly states, that case-law relates to benefit supplements, that is to say to cases where the recipient establishes an entitlement to benefits both in the State of residence and in the other State granting the more favourable benefits whose loss or reduction is prohibited by Community law, so that he is entitled to a supplement equal to the difference between the two.

13 — I refer to retention or recovery because, as may logically be supposed, the orphan will be entitled to a pension from 18 years of age, if he is studying at that time, for as long as he studies, up to the age of 25 (retention of entitlement). If, however, he begins studying at 20 years of age, I assume that payment of the pension will resume from that point onwards (recovery of entitlement).

14 — Case 733/79 *CCAF* v *Laterza* [1980] ECR 1915.

15 — Case 807/79 *Gravina* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205.

16 — Case 320/82 *D'Amario* v *Landesversicherungsanstalt Schwaben* [1983] ECR 3811.

17 — Case C-251/89 *Athanasopoulos and Others* v *Bundesanstalt für Arbeit* [1991] ECR I-2797.

It follows that the person concerned has no right to a supplement where the worker from whom his entitlement to benefits is derived [18] did not establish an independent entitlement to benefit in the other Member State.

30. Furthermore, such a right cannot be acquired solely on the basis of the aggregation rules provided for in Article 79(1)(a) of the Regulation. That is clear from the judgment of the Court in *Bastos Moriana*. [19] In that case, persons residing in Spain who were receiving benefits in accordance with Articles 77 and 78 of the Regulation sought benefit supplements from a German social security institution, although their social security entitlement had been established solely pursuant to the aggregation rules in Article 45 of the Regulation and not independently under German law. The Court clarified its case-law in *Athanasopoulos* (paragraph 21) and in *Durighello* (paragraph 22) and held that benefits which cannot be taken away from their recipients by the application of Articles 77 and 78 are those granted under the laws of another Member State *alone*, on the basis of the periods of insurance completed in that State, and not those acquired in the State in question following aggregation (paragraphs 17, 18 and 19). Thus, the Court held that '... Articles 77(2)(b)(i) and 78(2)(b)(i) of the regulation must be interpreted as meaning that the competent institution of a Member State is not bound to grant supplementary family benefits to pensioners or orphans residing in another Member State where the amount of the family benefits paid by the Member State of residence is lower than that of the benefits provided for by the laws of the first Member State if entitlement to the pension, or to the orphan's pension, has not been acquired solely by virtue of insurance periods completed in that State' (paragraph 23 and operative part).

31. By that judgment, therefore, a question which had been debated for a long time, namely whether 'acquired right' must be understood as meaning only a full entitlement to benefits which has been acquired in the other Member State, or as including an expectancy (or conditional right), was, I believe, clearly settled in favour of the first view. [20]

32. The same solution is, in my view, required in this instance too, given that in the two cases the facts and the claims of the persons concerned coincide to a great extent. The fact that a benefit supplement was sought in that case, while in this case the benefit itself is sought from the German institution, is immaterial in view of the Court's clear explanation that the person concerned may claim a benefit from the other State only where it was acquired in that State in accordance with its legislation.

18 — See *Athanasopoulos*, cited above, paragraph 32.

19 — Case C-59/95 *Bastos Moriana and Others* v *Bundesanstalt für Arbeit* [1997] ECR I-1071.

20 — It is to be noted that Advocate General Fennelly put forward the opposing view in his Opinion in that case (paragraph 31). Previously Advocate General Van Gerven had also put forward the same view (see points 14 and 15 of his Opinion in *Athanasopoulos*).

33. Moreover, the fact that the Court, in *Bastos Moriana*, limited itself to interpreting Articles 77(2)(b)(i) and 78(2)(b)(i), to which it refers exclusively, [21] indicates indirectly but clearly that it is not possible to apply the alternatives provided for in Articles 77(2)(b)(ii) and 78(2)(b)(ii).

That conclusion follows logically from the above decision of the Court since, both in *Bastos Moriana* and in this case, the claims of the persons concerned could be satisfied by means of the mechanism laid down in Articles 77(2)(b)(ii) and 78(2)(b)(ii) only if the periods of insurance completed by the employed person in Germany (insufficient by themselves to establish an entitlement under German law) were suplemented by the periods of insurance in Spain, that is to say through accumulation; however, the Court ruled out that possibility.

For that reason, I do not think that the mechanism in Article 78(2)(b)(ii) can be applied in this case in favour of the appellants.

34. The opposing arguments are not convincing. First of all, Article 79(1)(a) — which, if my understanding is correct, the referring court considers can be applied independently — cannot be applied in isolation in order to ascertain the applicable legislation, but only in conjunction with the provisions of Article 78(2)(b) and to the extent that those provisions refer to the article in question. That is clear from the wording of Article 79(1), which presupposes that the applicable legislation has already been identified under Article 78, and from the opening words of Article 79(1)(a). [22] Article 78(2) thus does not in fact refer to Article 79(1)(a) but to the aggregation *mechanism* mentioned in that provision and laid down in Articles 45 and 72 of the Regulation.

Accordingly, the 'acquisition', 'retention' and 'recovery' of the right to benefits which are facilitated by accumulation under Article 79(1)(a) are to be understood *within* the applicable legislation which has *already* been ascertained in accordance with Articles 77(2) and 78(2). In other words, the appellants are wrong in seeking to 'recover' the right to a pension which the German social security institution had previously conferred on them, in particular because they take for granted the very thing which is sought, namely that the applicable legislation in this case is the German legislation. [23]

21 — Paragraphs 8 and 9 of the judgment.

22 — '(a) *if that legislation* [that is to say that laid down by Articles 77 and 78] provides that ...'.

23 — As explained in the preceding points, there can be no question of the 'acquisition' of a right. However, nor can there be any question of the 'retention' of the right to a benefit under the Spanish legislation since, as already stated, that legislation precludes the continued grant of the pensions in this case.

35. I therefore consider that, in the circumstances of this case, Article 78(2)(b)(ii) of the Regulation cannot be applied and it is thus not possible for competence for the grant of a pension to pass to the German social security institution.

36. Of course, that does not mean that the legislation determined to be the applicable legislation in accordance with Article 78(2)(b)(i) cannot change in any circumstances. I am quite sure that, *if* the appellants' father *had* completed in Germany the period required in order for the right to a pension to be established, the appellants would have been able, under the Court's case-law, including *Bastos Moriana*, to have recourse against the German body and to seek the continued payment of their pensions because they were studying, irrespective of whether or not such an entitlement was provided for by Spanish law. The reason is that, in that case, it would be a question of an advantage or a right forming part of or being incidental to the basic right to draw a pension, which the insured person would have established under German law and which the appellants could not lose by reason of the application of Article 78. [24]

37. If that assumption is correct, one is led to conclude that the reason why the appellants are unable to have payment of their pension continued under German law is, above all, not the fact that their deceased father moved with his family to Spain and that the appellants live in that country, but the (unfortunately irremediable) fact that the worker had not completed the period of insurance required under German law.

38. The appellants maintain that an interpretation of Article 78 such as the one suggested by me infringes the principle of equal treatment and Article 51 of the Treaty and also leads to incongruous results; that is because, as the referring court also observes, if an orphan, in such circumstances, left Germany shortly after reaching the age of 18 he would *retain* the right to a pension, whereas if he left that country shortly before reaching the age of majority he would *be denied* that advantage, as in this case.

39. That argument is based on an incorrect premiss because the first limb of the comparison made is not valid. If the appellants had remained in Germany to study for a few months after reaching the age of 18, they would have continued to receive benefits from the German social security body for that period. However, both those benefits and the benefits which they would have received in Germany before their reaching the age of majority, by virtue of their residence, would have been paid on the basis of

24 — It is self-evident that, in that case, the appellants would also be entitled to receive a pension supplement from the German institution until they reached the age of majority if the German benefit were higher than the Spanish one.

the *aggregation* of their father's periods of insurance in Spain, in accordance with Articles 78(2)(b)(i), 79(1)(a) and 45 of the Regulation, because, as stated, the deceased was not insured in Germany long enough for an independent right to be established under German law. Consequently, on their moving to Spain they would have lost the right to a pension *vis-à-vis* the German social security body, in accordance with the judgment in *Bastos Moriana*.

40. The objection regarding unequal treatment would, perhaps, be more persuasive if it were based on a comparison of the appellants' current situation in Spain with their situation had they moved to Germany after reaching the age of majority and remained there, or with the situation of other orphans of migrant workers, who, in similar circumstances, remained all along in Germany.

As regards the first part of such an objection, the decision as to the appellants' remaining in Spain or possibly moving to Germany falls, in principle, within their discretion. Such a decision is dependent on the balancing of many, mostly subjective, factors and is not dictated exclusively or mainly by the prospect of receiving orphans' benefits in the host State. I therefore do not consider that such a case presents a sufficient degree of objectivity to form the basis of a ruling on unequal treatment.

As regards the second part of that objection, I am not entirely persuaded that the two situations are comparable, basically for the same reasons. As is the case with the appellants, the decision of the parents or the family whether to stay in the same location or to change the place of residence is taken after weighing up many factors and not exclusively on the basis of the prospects of receiving social security benefits in the future.

41. In that regard — but also in relation to the second objection, that Article 78 of the Regulation infringes Article 51 of the Treaty, which is put forward in rather vague terms — it is perhaps necessary to take into account that, as is apparent from the order for reference, the appellants' father died before Spain acceded to the European Community and, consequently, does not have the status of a worker within the meaning of Article 48 of the Treaty [25] or, therefore, within the meaning of Article 51 either. Since the appellants' rights stem from those of their deceased father, [26] I doubt whether Article 51 of the Treaty can be successfully relied on in those circumstances.

25 — See Case C-131/96 *Mora Romero* v *Landesversicherungsanstalt Rheinprovinz* [1997] ECR I-3659, paragraph 17.

26 — Cf. *Athanasopoulos*, cited above, paragraph 32.

B — *Questions 2 and 3*

42. Since, as I have stated, Article 78(2) of the Regulation does not provide a basis for granting the appellants' application, it is necessary to examine the second and third questions, by which the referring court asks whether the provisions of the 1973 Convention between Germany and Spain, as amended in 1975, can be applied in this case.

43. The German and Austrian Governments propose that a negative answer be given, whereas the other parties who submitted observations maintain that the answer must be in the affirmative.

44. As is well known, the Court held in *Walder*, [27] on which the abovementioned Governments rely, that the Regulation replaced previous bilateral social security conventions where they were not mentioned in the relevant annex to the Regulation even if their application was more advantageous to persons entitled to benefits than the Regulation (paragraphs 8 and 9).

45. In *Rönfeldt*, [28] however, the Court, after holding that provisions of bilateral social security conventions which have the effect of placing the worker concerned in a more favourable position than is accorded by Community provisions must be understood as being legislation under which benefits are granted (paragraph 27), ruled that 'Articles 48(2) and 51 of the EEC Treaty must be interpreted as precluding the loss of social security advantages for the workers concerned which would result from the inapplicability, following the entry into force of Council Regulation (EEC) No 1408/71, of conventions operating between two or more Member States and incorporated in their national law' (paragraph 29).

46. In its subsequent judgment in *Thévenon*, [29] the Court found that Mr Thévenon, a French worker who had been employed in France and Germany and sought the application in his favour of the social security convention concluded between France and Germany in 1950, had exercised his right to freedom of movement *after* the entry into force of the Regulation, that is to say after the convention had already been replaced by the Regulation. That distinguished the case of *Thévenon* from that of *Rönfeldt*, in which the worker had been employed in Denmark as well as in Germany *before* Denmark

27 — Case 82/72 *Walder* v *Bestuur der Sociale Verzekeringsbank* [1973] ECR 599.

28 — Case C-227/89 *Rönfeldt* v *Bundesversicherungsanstalt für Angestellte* [1991] ECR I-323.

29 — Case C-475/93 *Thévenon* v *Landesversicherungsanstalt Rheinland-Pfalz* [1995] ECR I-3813.

acceded to the EEC and, therefore, before the Regulation entered into force in that country. The Court accordingly held that Mr Thévenon could not claim to have suffered the loss of social security advantages which he would have enjoyed under the convention between Germany and France and that the convention therefore could not be applied in that case (paragraphs 22 to 26).

On the basis of those considerations the Court held that '... Articles 48(2) and 51 of the Treaty must be interpreted as meaning that they do not preclude the replacement by Regulation No 1408/71, pursuant to Article 6 thereof, of a convention binding two Member States exclusively where, prior to the entry into force of Regulation No 1408/71, an insured person completed insurance periods in only one of the signatory States, even where the application of the bilateral social security convention would have placed that insured person in a more favourable position'.

47. In the instant case, Mr Rodríguez died before Spain acceded to the EEC, having worked in Germany (a Member State) and Spain (not a Member State); his children, whose entitlements are derived from him, had established the right to a pension on the basis of the convention between Germany and Spain, which the German social security body paid them from February to December 1985. In addition, that convention had been incorporated into German and Spanish law.

48. I consider that, once established, that right is protected not only as to the amount of the pension but also as regards the other, substantive and temporal, conditions for its grant where they are more favourable for the insured person or, for the same reason, for those deriving entitlement from him.

49. It is not disputed that, if the convention between Germany and Spain were to be applied in this case, the appellants would have the right to continued payment of a pension by the German social security body.

I accordingly consider that Articles 48 and 51 of the Treaty require the provisions of the convention between Germany and Spain to be applied in this case, that being more favourable for the appellants than application of the Community legislation, namely Article 78(2)(b)(i) of the Regulation.

VI — Conclusion

I accordingly suggest that the following answer should be given to the questions referred for a preliminary ruling:

(1) Article 78(2)(b)(i) of Regulation (EEC) No 1408/71 is to be interpreted as meaning that where orphans are no longer entitled to orphans' pension in the Member State where they reside because they have reached the age of majority, the competent institution of another Member State, whose legislation provides for such a pension to continue to be paid if an orphan is studying, is not obliged to grant the pension if the orphan's entitlement has not been acquired exclusively on the basis of periods of insurance completed in that State.

(2) Articles 48(2) and 51 of the Treaty are to be interpreted as precluding the loss of social security advantages for the workers concerned and their orphan children which would result from the inapplicability, following the entry into force of Regulation (EEC) No 1408/71, of conventions operating between two or more Member States and incorporated in their national law, where, before the Regulation entered into force, a right to a pension had already been established under the convention in question. The continued payment of a pension to orphans who are studying after reaching the age of majority also constitutes such an advantage.