OPINION OF MR ADVOCATE GENERAL MISCHO
delivered on 24 January 1989 *

Mr President,
Members of the Court,

1. The tribunal du travail, Namur, has asked for a preliminary ruling on the interpretation of Article 78(2) of Regulation No 1408/71 of the Council of 14 June 1971 on the application of social security to employed persons and members of their family moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

2. The plaintiff in the main proceedings, Adalino Baldi, was employed in Belgium until 6 April 1977. At the end of July 1977, he transferred his residence to Italy. Since 1 May 1972 he had been in receipt of an Italian invalidity pension. It also appears from the file on the case forwarded to the Court by the tribunal du travail that by decision of 31 March 1984 Mr Baldi was awarded a Belgian invalidity pension with effect from 6 April 1978.

3. As a result of his wife's death, which occurred on 10 March 1961, he received in respect of his son Renaldo Belgian family allowances, *at the increased rate for orphans,* until 31 August 1981, when the Caisse de compensation pour allocations familiales de l'Union des classes moyennes (Compensation Fund for Family Allowances for the Union of Small Firms and Traders — hereinafter referred to as the 'CCAF'), the defendant in the main proceedings, suspended payment. Furthermore, by letter of 14 February 1984, that institution demanded repayment of the sums paid — in its view improperly — in respect of those allowances since Mr Baldi's departure for Italy.

4. Mr Baldi then brought an action before the tribunal du travail, Namur, for an order that the CCAF should pay him the difference between the family allowances received in Italy and the higher allowances payable under the Belgian legislation. His claim is based in particular on Article 78 of Regulation No 1408/71, regarding the interpretation of which the tribunal du travail, Namur, has submitted the following question to the Court:

'Is Article 78(2) of Regulation No 1408/71 to be interpreted as meaning that an orphan in respect of whom family allowances are payable at the rate for orphans as a result of the death of his mother who was not an employed person may, as a result of a change of residence to the territory of another Member State by which family allowances are payable at a different rate, forfeit the family allowances payable by the first Member State, *or* as meaning that he is entitled to receive from the competent institution of the first Member State the difference between the family allowances payable in the second Member State and the orphan's allowances previously payable?'

5. The problem stems from the fact that, according to the defendant in the main

* Original language: French.

proceedings, the plaintiff's claim has no legal basis in either Belgian or Community law. It claims that under the Belgian legislation, and in particular the last paragraph of Article 51 of the Belgian Consolidated Law of 29 December 1939 on family allowances for employed persons, such allowances are payable only if the children are brought up within the Kingdom of Belgium. Since that had ceased to be the case, Mr Baldi forfeited his entitlement to the Belgian family allowances at the higher rate.

6. The defendant in the main proceedings also considers that Mr Baldi cannot found his claim on Community law, in this case Regulation No 1408/71 of the Council.

7. For its part, the national court refers in its question to Article 78(2) of that regulation, which is entitled 'Orphans'. It should however be noted that paragraph (2) of that article refers to orphans of 'a . . . worker' and not to orphans whose deceased parent did not work, as in the case of Mrs Baldi. Article 77, on the other hand, is entitled 'Dependent children of pensioners' and Mr Baldi's son is indeed the dependent child of a pensioner.

8. I consider therefore that a situation such as that described by the national court falls within the scope of Article 77. Its first paragraph states that the term 'benefits' for the purposes of that article is to mean 'family allowances for persons receiving pensions for old-age, invalidity or accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners'.

9. Pursuant to Article 77(2)(b)(i), if a pensioner draws pensions under the legislation of more than one Member State the abovementioned benefits are granted in accordance with the legislation of whichever of those States he resides in, provided that a right to one of those benefits is acquired under the legislation of that State. That being the position in this case, it is in principle the Italian benefits which must be granted to Mr Baldi.

10. However, it has been consistently held by the Court [1] and in particular in the *Laterza* and *Patteri* judgments delivered in proceedings between — as in this case — migrant workers and Belgian compensation funds for family allowances, that

'Article 77(2)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that entitlement to family benefits from the State in whose territory the recipient of an invalidity pension resides does not take away the right to higher benefits awarded previously by another Member State. If the amount of family benefits actually received by the worker in the Member State in which he resides is less than the amount of the benefits provided for by the legislation of the other Member State, he is entitled to a supplement to the benefits from the

1 — See the judgment of 12 June 1980 in Case 773/79 *Caisse de compensation* v *Laterza* [1980] ECR 1915, of 24 November 1983 in Case 320/82 *D'Amario* v *Landesversicherungsanstalt Schwaben* [1983] ECR 3811 and of 12 July 1984 in Case 242/83 *Caisse de compensation* v *Patteri* [1984] ECR 3171

competent institution of the latter State equal to the difference between the two amounts' (operative part of the *Laterza* judgment).

11. The reasoning on which that principle is based in the abovementioned judgments leads me to conclude that no distinction need be drawn between a case in which the benefits of 'the other Member State' are, in general, higher than those of the Member State of residence and a case where they are higher because 'the other Member State' grants an increase in the family allowances following the death of the worker's spouse.

12. That has undoubtedly been the position since 6 April 1978, as on that date Mr Baldi became entitled to pensions under the legislation of more than one Member State. However, the problem is different with respect to the previous period, during which Mr Baldi received only one pension under the legislation of only one Member State, namely Italy. That pension was paid to him as from 1 May 1972. He was thus already in receipt of it for part of the period during which he was still working in Belgium. The question might therefore be asked whether the family allowances ought not to have been paid as from that date by Italy, since Article 77(2)(a) provides that

'benefits shall be granted . . . to a pensioner who draws a pension under the legislation of one Member State only, in accordance with the legislation of the Member State responsible for the pension'.

13. That is not, however, the case since Article 79(3) provides that

'the right to benefits due under paragraph (2) and 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 profession or trade activity. In such a case, the persons concerned shall be considered as members of the family of a worker'.

14. The family allowances thus ought indeed to be paid by Belgium at the Belgian rates since, by virtue of Article 13(2)(a) of Regulation No 1408/71, Adalino Baldi was subject to Belgian legislation by reason of the fact that he was employed in that country.

15. On 6 April 1977, Mr Baldi fell ill and during his illness, at the end of July 1977, he returned to Italy. However, sickness benefits under Belgian legislation and, consequently, Belgian family allowances as well were still payable to him since, as the Commission pointed out at the hearing, 'until a person becomes a pensioner he remains a worker'.

16. But matters are complicated by the fact that it follows from Decision No 84 of the Administrative Commission set up by Article 80 of Regulation No 1408/71 that, for the purposes of Article 79(3), family benefits or

allowances are payable, during a period of suspension of work as a result of illness, only for a period of six months (Official Journal C 75, 19.9.1973, p. 15). By virtue of that decision, Mr Baldi would have lost the benefit of the Belgian family allowances with effect from 6 October 1977. The Court has, however, held [2] that the decisions of the Administrative Commission are not of such a nature as to require the social security institutions to use certain methods or adopt certain interpretations when they apply the Community rules. A decision of the Administrative Commission does not therefore, the Court added, bind the tribunal du travail.

17. If it were accepted, nevertheless, that payment of the Belgian family allowances could validly have been discontinued six months after Mr Baldi fell ill, that is to say, with effect from 6 October 1977, his situation would then have been, as from that date, that of a person entitled to an invalidity pension under the legislation of one Member State only. Mr Baldi's case would therefore have come within the scope of Article 77(2)(a), until 6 April 1978, when he became entitled to a Belgian invalidity pension, which, as we have seen, rendered applicable Article 77(2)(b)(i).

18. The effect of the rule contained in Article 77(2)(a) would be to specify Italian legislation, under which the invalidity pension was paid, as the applicable legislation for the purpose of family allowances.

2 — See judgment of 14 May 1981 in Case 98/80 *Romano* v *Institut national d'assurance maladie-invalidite* [1981] ECR 1241

19. However, I am of the opinion that in such circumstances the previous decisions of the Court mentioned earlier, relating to the differential supplement, must apply. They are based essentially on the fact that the purpose of Article 51, namely the free movement of workers, would not be attained if the advantages acquired under the legislation of one Member State could be lost following the exercise of the right of free movement. That fact seems to me to be as decisive in the case of subparagraph (a) as in the case of subparagraph (b) of Article 77(2). Those two provisions, moreover, fulfil similar functions within Chapter 8 of Regulation No 1408/71.

20. It should also be noted that the *D'Amario* judgment cited in footnote 1 states that the decision in question applies to Articles 77 and 78, without further distinction. Finally, Decision No 129 of the Administrative Commission (Official Journal 1986, C 141, p. 7), which reflects the consequences of that judgment, likewise makes no distinction between the various subparagraphs of Article 77.

21. It must therefore be concluded that during that first period as well, that is to say the period starting when the CCAF ceased to pay Mr Baldi the Belgian family allowances at the rate for orphans and ending on the date on which Mr Baldi became entitled to a Belgian invalidity pension, the CCAF was under an obligation to pay him the difference between the amount of the Belgian family allowances at the rate for orphans and that of the Italian family allowances.

22. I therefore propose that the following answer should be given to the tribunal du travail, Namur:

'Article 77 of Regulation No 1408/71, which applies to a situation such as that involved in the main proceedings, must be interpreted as meaning that entitlement to family allowances payable by the State in whose territory the recipient of an invalidity pension resides, irrespective of whether that right is based on Article 77(2)(a) or Article 77(2)(b)(i), does not bring to an end previously acquired entitlement to higher family allowances payable by another Member State, even where the difference in amount is attributable to the fact that in the latter Member State the rate was increased by reason of the death of the worker's spouse. Where the amount of the family allowances actually received in the Member State of residence is thus lower than that of the allowances provided for by the legislation of the other Member State, the worker is entitled to a supplementary allowance, payable by the competent institution of the latter State, equal to the difference between the two amounts.'