OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 24 January 1991 *

Mr President,
Members of the Court,

1. The Sozialgericht Nürnberg (Social Court, Nuremberg, hereinafter referred to as 'the national court') is required to decide a large number of cases brought by persons residing in a Member State other than the Federal Republic of Germany against the Bundesanstalt für Arbeit (Federal Labour Office), the German institution responsible under the Bundeskindergeldgesetz (Federal Law on Child Allowances) for paying child allowance (Kindergeld). The question at issue in all these cases is whether the German institution is bound to pay to pensioners or orphans residing in another Member State a 'supplement' (in German, 'Unterschiedsbetrag'), equal to the difference between the amount of benefits covered by Articles 77 and 78 of Regulation No 1408/71 [1] which are actually received under the legislation of the Member State of residence and the amount of the child allowance provided for by the Bundeskindergeldgesetz.

From the large number of cases pending before it, the national court has chosen ten examples ('Pilotfälle' — sample cases) in order to give the Court an overview of the types of cases which arise. In the framework of these cases the national court considers it necessary for the Court to give an interpretation of Articles 77 and 78 of Regulation No 1408/71. It has submitted to the Court a number of questions, which it has divided into four groups.

Before examining these questions, it seems to me useful to set out the distinguishing features of the rules laid down in Articles 77 and 78 of Regulation No 1408/71.

Distinguishing features of the rules laid down in Articles 77 and 78 of Regulation No 1408/71

2. Article 77 of Regulation No 1408/71 contains a number of rules for determining the Member State in accordance with whose legislation benefits for dependent *children* of pensioners are granted. It is expressly stated that these rules are applicable irrespective of the Member State in whose territory the pensioner or the children are residing.

The article starts from the *principle* that the benefits are to be granted in accordance with the legislation of one Member State alone. If a pensioner draws a pension under the legislation of one Member State only,

* Original language: Dutch.

1 — Articles 77 and 78 of Council 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, in the version contained in Annex I to Council Regulation (EEC) No 2001/83 of 2 June 1983 (OJ 1983 L 230, p. 6).

the benefits are to be granted in accordance with the legislation of that Member State (Article 77(2)(a)). But even in the case in which a pensioner draws pensions under the legislation of more than one Member State, it is still the rule that family allowances are in principle awarded in accordance with the legislation of one Member State. The following rules governing priority are then applicable. First comes the Member State in whose territory the pensioner resides (Article 77(2)(b)(i)). If no right to benefits is acquired under that legislation, in the second place comes the Member State to whose legislation he has been subject for the longest period of time (first sentence of Article 77(2)(b)(ii)). If no right to benefit is acquired under the legislation of that Member State either, it is necessary to consider the other Member States concerned, in decreasing order of the lengths of periods of insurance or residence completed there (second sentence of Article 77(2)(b)(ii)).

There is, however, one important *exception* to this principle whereby family allowances are awarded in accordance with the legislation of one Member State only, even if a pensioner draws pensions under the legislation of more than one Member State. In *Laterza*, [2] the Court ruled as follows:

'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 competent institution of the latter State equal to the difference between the two amounts.'

The Court confirmed this decision in *Patteri* [3] and *Baldi*. [4]

3. Article 78 of Regulation No 1408/71 contains similar rules for determining the Member State under whose legislation *orphans'* benefits are to be granted. Once again, orphans' benefits are in principle granted in accordance with the legislation of one Member State only, even in the case in which the deceased parent was subject to the legislation of several Member States. Once again, there is an important exception to this principle. In *Gravina*, [5] the Court ruled as follows:

'Article 78(2)(b)(i) of Regulation No 1408/71 of the Council of 14 June 1971 must be interpreted as meaning that the entitlement to benefits payable by the State in whose territory the orphan to whom they have been awarded resides does not remove the entitlement to benefits greater in amount previously acquired under

2 — Judgment in Case 733/79 *Caisse de Compensation des Allocations Familiales* v *Cosimo Laterza* [1980] ECR 1915.

3 — Judgment in Case 242/83 *Caisse de Compensation des Allocations Familiales* v *Salvatore Patteri* [1984] ECR 3171.

4 — Judgment in Case 1/88 *Adalino Baldi* v *Caisse de Compensation des Allocations Familiales* [1989] ECR 667.

5 — Judgment in Case 807/79 *Giacomo Gravina and Others* v *Landesversicherungsanstalt Schwaben* [1980] ECR 2205.

the legislation of another Member State alone. Where the amount of the benefits actually received in the Member State of residence is less than the benefits provided for by the legislation of the other Member State alone the orphan is entitled to supplementary benefits, payable by the competent institution of the latter State, equal to the difference between the two amounts.'

The Court confirmed this decision in *D'Amario*[6] and *Ventura.*[7]

The questions contained in (1)

4. The *first question* contained in (1) concerns two different situations.

The *first situation* concerns a pensioner subject to the legislation of *two* Member States because he has worked in both Member States. He has one or more children residing with him. In respect of those children he receives benefits in accordance with the legislation of the Member State of residence. He considers, however, that in accordance with the abovementioned judgments of the Court he is entitled to a supplement to be paid by the competent institution of the other Member State (in this case, Germany).

The *second situation* differs from the first in so far as it concerns not a pensioner with children but an orphan of a deceased migrant worker who was subject to the legislation of *two* Member States. This orphan is in receipt of benefits in accordance with the legislation of the Member State in whose territory he resides. He too considers, however, that he is entitled to a supplement to be paid by the competent institution of the other Member State (in this case, Germany).

The national court wishes to establish whether the competent institution of the other Member State (Germany) is required by Article 77 (first situation) or by Article 78 of Regulation No 1408/71 (second situation) to pay a supplement where under the legislation of that State it is a condition of entitlement to benefit that the pensioner and his children or the orphan must reside in that State. The Bundeskindergeldgesetz does in fact make the award of child allowance subject to such a residence requirement.[8]

5. It is clear from the order for reference that the national court takes as its starting point the abovementioned judgments of the Court in connection with the granting of a supplement. It considers, however, that these judgments are open to interpretation. It points out in particular that the words 'by the legislation of the other Member State alone' in the *Gravina* judgment might provide support for the view that no supplement is payable to orphans and possibly even to pensioners if they do not satisfy all the conditions, including a residence requirement, for qualifying for benefit, laid down under the legislation of

6 — Judgment of 24 November 1983 in Case 320/82 *Benito D'Amario* v *Landesversicherungsanstalt Schwaben* [1983] ECR 3811.

7 — Judgment of 14 December 1988 in Case 269/87 *Natalino Ventura* v *Landesversicherungsanstalt Schwaben* [1988] ECR 6411, paragraph 14.

8 — See Paragraph 1, subparagraph 1(1) and 2(1), and Paragraph 2, subparagraph 5, of the Bundeskindergeldgesetz.

that other Member State. That interpretation would mean that, in view of the residence requirement in the Bundeskindergeldgesetz, the competent German institution would not have to grant a supplement to the plaintiffs in the main proceedings, who reside outside German territory.

6. I do not consider that this interpretation of the judgments of the Court in connection with the granting of a supplement can be accepted.

Those judgments are based on the idea that Articles 77 and 78 of Regulation No 1408/71 must be interpreted in the light of Article 51 of the EEC Treaty, which requires the Council to adopt such measures in the field of social security as are necessary to provide freedom of movement for workers. As the Court stated in *Gravina* (paragraph 6), the aim of Article 51 would not be achieved

'if, as a result of the exercise of their right to freedom of movement, workers were to lose the social security advantages guaranteed to them, in any event, by the legislation of a single Member State'.

Following the same reasoning, the Court stated in its judgment in *Rossi* (paragraph 14)[9] that,

'The Community rules could not, in the absence of an express exception consistent with the aims of the Treaty, be applied in such a way as to deprive a migrant worker or his dependents the benefit of a part of the legislation of a Member State'.

In *Laterza* (paragraph 8) and *Gravina* (paragraph 7) the Court then added that those rules could not bring about a reduction in the benefits awarded by virtue of national legislation either.

7. This reasoning underlying the right to a supplement may be used to define the scope of that right. By virtue of the right, the pensioner or orphan concerned is entitled to an amount equal to the difference between the amount of the benefit which he actually receives in the Member State of residence (first limb of the comparison) and the amount of the benefit which he would have received under the legislation of the other Member State (in this case, Germany) if the pensioner or deceased worker had not exercised the right to free movement but had continued to reside in that Member State (second limb of the comparison).

It is clear from the foregoing that the judgments of the Court cannot be interpreted as meaning that a supplement could be refused if the legislation of the Member State which must bear the cost of the supplement subjects the payment of family benefits to a residence requirement. In the first place, it may be observed that the right to a supplement has no meaning unless the beneficiary resides in a Member State other than that which bears the cost of the supplement. For purposes of assessing the second limb of the comparison the Court

9 — Judgment in Case 100/78 *Claudino Rossi* v *Caisse de Compensation des Allocations Familiales* [1979] ECR 831

has, admittedly, acknowledged that the pensioner and his children or the orphan must satisfy the conditions governing entitlement to benefit under the legislation of the Member State concerned (in this case, Germany). In that context, however, the persons concerned must be *deemed* to reside in that Member State, which effectively means that a residence requirement cannot be applied to them. It would ultimately be incompatible with the express terms of Regulation No 1408/71 to attribute any other interpretation to the judgments of the Court. Indeed, Article 77(2) of the regulation provides that pensioners can claim the benefits provided for in that article in respect of their children 'irrespective of the Member State in whose territory the pensioner or the children are residing'. Article 78(2) of the regulation contains a similar provision as regards the orphans' benefits provided for in that article. These must be granted 'irrespective of the Member State in whose territory the orphan or the natural or legal person actually maintaining him is resident'.

Consequently, the answer to the first question in (1) must be that a supplement is payable even if, under the legislation of the Member State responsible for paying the supplement, the grant of benefits is subject to the condition that the pensioner and his children or the orphan reside in the territory of that State.

8. In order to understand the *second question* in (1), it is useful to examine the German rules applicable to persons who have suffered a serious accident at work and who are in receipt of an invalidity pension. Under Paragraph 583, subparagraph 1, of the Reichsversicherungsordnung (National Social Insurance Code) they are entitled, subject to certain conditions, to a supplementary allowance in addition to their invalidity pension, known as the 'Kinderzulage' (hereinafter referred to as 'child supplement') if they have one or more dependent children. This child supplement is not an independent allowance paid by the institution responsible for paying child benefit. It forms part of the invalidity pension, which is increased by 10% for each dependent child.

Paragraph 8 of the Bundeskindergeldgesetz provides that no child allowance — that is to say the child benefit which is in principle payable to all persons with dependent children who reside in the Federal Republic — is to be granted in respect of children for whom child supplement is already paid. Nevertheless, a person who has suffered an accident at work may claim child allowance if the amount of the child supplement granted is less than the amount of the child allowance which he would have received if he was not subject to the rules on invalidity. This situation can arise in particular in the case of large families because the rules on child allowance, unlike those on child supplement, provide for the allowance per child to increase according to the number of dependent children. [10] In such a situation, a person entitled to an invalidity pension may claim child allowance in respect of the difference between the amount of the child supplement which he actually receives and what he would have

10 — See paragraph 10 of the Bundeskindergeldgesetz.

received in respect of child allowance. This difference, hereinafter referred to as 'partial child allowance' ('Teilkindergeld'), is paid by the institution responsible for granting child allowance.

The aforesaid rules were repealed at the end of 1983.[11] Since that date, persons who have suffered a serious accident at work as a result of which they draw an invalidity pension receive solely child allowance in respect of their dependent children. The rules are still applied, however, to persons who were receiving child supplement before 1984.

9. Mr Palermo, who is the plaintiff in the seventh case pending before the national court and is of Italian nationality, is in the latter situation, as is apparent from his observations to the Court. In 1978, while he was employed in Germany, he suffered a serious accident at work. In 1979 he returned to Italy. He resides there together with his five children, who were born between 1973 and 1982 (and some of whom were therefore born after his return to Italy). He is in receipt there of an invalidity pension and a benefit in respect of his children under the Italian legislation. He is also in receipt of an invalidity pension together with child supplement in accordance with the Reichsversicherungsordnung. The amount of the child supplement, however, is less than the amount of child allowance normally payable. Mr Palermo therefore considers that he is entitled to partial child allowance, subject to deduction of the (lower) child benefit actually paid under the Italian legislation.

11 — Paragraph 1, point 22, of the Haushaltsbegleitsgesetz 1984 of 22 December 1983 (Bundesgesetzblatt I, p. 1532).

10. Under Article 77(1) of Regulation No 1408/71 the term 'benefits' for purposes of that article is defined as follows:

'Family allowances for persons receiving pensions for old age, invalidity or an accident at work or occupational disease, and increases or supplements to such pensions in respect of the children of such pensioners *with the exception of supplements granted under insurance schemes for accidents at work and occupational diseases*' (emphasis added).

No one denies that child supplement must be regarded as a supplement to pensions granted under insurance schemes for accidents at work and are therefore outside the scope of Article 77 of Regulation No 1408/71. As I understand it, the question asked by the national court seeks to establish whether, as an extension of the exclusion of child supplement for a person in receipt of invalidity pension, other benefits for children of the pensioner, and therefore partial child supplement as well, are also excluded.

11. The exclusion of supplements to pensions granted under insurance schemes for accidents at work and occupational diseases is prompted by the fact that these are allowances for which rules are laid down elsewhere in Regulation No 1408/71 (see Title III, Chapter 4 of Regulation No 1408/71, entitled 'Accidents at Work and Occupational Diseases').

In this regard Article 58(3), which forms part of Chapter 4 of Title III of Regulation No 1408/71, provides as follows:

'The competent institution of a Member State whose legislation provides that the amount of cash benefits shall vary with the number of members in the family shall take into account also the members of the family of the person concerned who are residing in the territory of another Member State, as if they were residing in the territory of the competent State'.

Article 10(1) of Regulation No 1408/71 provides as follows:

'Save as otherwise provided in this regulation ... pensions for accidents at work or occupational diseases ... acquired under the legislation of one or more Member States shall not be subject to any reduction, modification, suspension, withdrawal or confiscation by reason of the fact that the recipient resides in the territory of a Member State other than that in which the institution responsible for payment is situated'.

On the basis of the provisions set out above Mr Palermo is entitled to — and is actually in receipt of — an invalidity pension under the German legislation together with child supplement for his children who reside in Italy.

12. It does not follow from the foregoing that partial child allowance is also outside the scope of Article 77 of Regulation No 1408/71. This supplement is not part of an invalidity pension. It is part of the child allowance granted under the rules laid down in the Bundeskindergeldgesetz. Germany made a declaration under Article 5 of Regulation No 1408/71 in which it states that allowances under the Bundeskindergeldgesetz must be regarded as children's allowances as referred to in Article 77 of the regulation.[12] The Court ruled in *Beerens*[13] that benefits granted on the basis of a law specified in such a declaration are social security benefits within the meaning of Regulation No 1408/71. In view of the aforesaid declaration by Germany, which expressly refers to Article 77 of Regulation No 1408/71, it is therefore clear that any benefit under the Bundeskindergeldgesetz must be regarded as children's allowances within the meaning of Article 77.

In view of the foregoing the answer to the second question in (1) must in my view be affirmative: Article 77 of Regulation No 1408/71 is applicable to the part of the child allowance payable under the Bundeskindergeldgesetz to a person receiving a pension for an accident at work who has one or more dependent children.

The questions contained in (2)

13. In the questions in (2), the national court does not indicate the Community provision to be interpreted by the Court.

12 — Point IV.1 (b) of the Declaration published in Official Journal 1980 C 139, p. 1. This Declaration, as amended by the Declaration published in Official Journal 1983 C 351, p. 1, reads as follows:
'(b) Children's allowances (in the German version: Kindergeld): Law concerning Children's Allowances (Bundeskindergeldgesetz) of 14 April 1964, with amendments and supplements, in the applicable version.'

13 — Judgment in Case 35/77 *Elisabeth Beerens* v *Rijksdienst voor Arbeidsvoorziening* [1977] ECR 2249.

From the context, however, it can be inferred that the request for interpretation concerns Article 77 of Regulation No 1408/71 alone. This is the provision governing the situation of a pensioner with dependent children, to which these questions relate.

As I understand it, the *first question* in (2) concerns a pensioner who is a national of one Member State and has worked both there and in another Member State (in this case, Germany). As in the first situation in (1), he resides together with his children in the first State. Under the legislation of the Member State of residence he receives two benefits: a pension and child allowance. He also receives a pension under the legislation of the other Member State (in this case, Germany). It is a particular feature of the situation at issue here that the right to the latter pension did not arise until after the person concerned had changed his residence to the Member State of which he is a national.

This is the situation arising in particular in the case of Mr Giganti, the plaintiff in the fourth case, as is apparent from his observations to the Court. In 1979, Mr Giganti, an Italian national who at that time resided in Germany, applied to the competent German institution for an invalidity pension. In *1980* he returned to Italy. Under the Italian legislation he was granted an invalidity pension and allowances for his two children. In *1981* the German institution awarded him an invalidity pension (with effect from June 1979) together with an allowance for his children called a 'Kinderzuschuss' (hereinafter referred to as 'child grant').[14] The amount of the child grant, however, is less than the child allowance normally payable. Mr Giganti therefore considers that he is entitled to partial child allowance, subject to deduction of the (lower) allowance actually paid under Italian legislation for his children.

By the first question in (2), the national court seeks to establish whether Article 77 of Regulation No 1408/71 must be interpreted as meaning that there is a right to a supplement even if the right to a pension under the legislation of one Member State (in this case, Germany) does not arise until after residence has been transferred to another Member State (in the case of Mr Giganti: Italy).

The *second question* in (2) is asked in the event that the first is answered in the affirmative. It concerns a situation such as that of Mr Palermo's, in which the pensioner's family increases after his return to the Member State of which he is a national. The national court wishes to establish whether the supplement is then payable only for children who were

14 — Under Paragraph 1262 of the Reichsversicherungsordnung, pensioners other than persons who have suffered serious accident at work (to whom the rule in Paragraph 583 of the Reichsversicherungsordnung is applicable) can claim child grant for their children if they were receiving this benefit before 1984. Its status is analogous to that of child supplement (discussed in 8. above). The persons concerned can also claim payment of partial child allowance if the amount of child grant granted is less than the child allowance normally payable.

dependents before transfer of residence or whether it is also payable for children born thereafter.

14. The national court has submitted these questions because in its opinion the judgments of the Court can be interpreted in two ways. In *Laterza*, the Court stated that entitlement to child benefits from the State in whose territory the pensioner resides does not take away the right to higher benefits '*awarded previously* by another Member State'. The national court states that this sentence gave rise to the theory known under German doctrine as the theory of the protection of acquired rights. [15] According to this theory, the right to a supplement is intended solely to protect acquired rights. These rights cannot be reduced as a result of the exercise of the right of free movement. But if the person concerned, before exercising this right to free movement, did not satisfy all the conditions laid down for receiving child benefit under the legislation of the Member State in which he was then residing, he would not have acquired any right to child allowance and consequently that Member State would not be responsible for paying a supplement. The Bayerische Landessozialgericht accepted that theory. The national court asks, however, how far the theory can be reconciled with the view of the Court in *D'Amario* that the question whether the residence of an orphan has always been established in the Member State or whether it has been transferred there is of no relevance for the application of Articles 77 and 78 of Regulation No 1408/71 (paragraph 7).

15 — See in this connection, but *contra*, J. Stahlberg, 'Deutsches Kindergeld für EG-Staatsangehörige', *Die Sozialgerichtsbarkeit* 1989, p. 238, at p. 245.

15. In its observations submitted to the Court the German Government defends the aforesaid theory. The Commission, the Italian Government and the parties to the main proceedings, however, reject the theory in their observations on this point, and they are in my view right to do so. I have already (in 7.) stated that in order to ascertain whether there is a right to a supplement, the legislation of the Member State other than that in which the person concerned resides must be applied *as if* the pensioner and his children resided in the territory of that State. It follows that no distinction may be drawn between pensioners on the basis of their residence at the date on which the right to the grant of a pension arises or the date on which the children are born.

I am admittedly in agreement with the starting point of the German Government, that the supplement is solely intended to protect rights acquired by the pensioner. The German Government wrongly considers, however, that the person concerned has not yet acquired any rights if he had received or could receive no benefit at the time at which he moved to another Member State. The right to child allowance is certainly linked to the right to a pension. If the right to a pension is acquired as a result of the circumstance to which this right is primarily attached (for example, employment and/or, according to the type of pension, the occurrence of a specified risk) but no pension has yet been granted because all the conditions had not yet been

satisfied (for example, because the person concerned had not yet attained pensionable age or some other circumstance specified for actual payment had not yet occurred), the right to a pension and with it the right to child allowances is acquired conditionally. This conditional right to benefit is protected by the Community rules in the same way as the right to benefits already payable on that date. Consequently, a supplement to be paid by a Member State other than the Member State of residence is payable even if the right to a pension does not arise under the legislation of that Member State until after residence has been transferred, as well as for children born after residence is transferred.

16. The judgments of the Court support this interpretation. Not only *D'Amario*, cited by the national court (which, however, concerns the situation of an orphan) but also, the more recent judgment in *Baldi*, seem to me to be important. *Baldi* concerned a pensioner of Italian nationality who had worked both in Italy and in Belgium. In 1977 Mr Baldi settled in Italy. He received there an invalidity pension and child allowance in accordance with the Italian legislation. It was not until 1978 that he was granted the right to an invalidity pension under the Belgian legislation. This factor did not prevent the Court from deciding that in such a situation the competent Belgian institution was bound to pay a supplement by virtue of Article 77 of Regulation No 1408/71.

The judgment in *Laterza* can, moreover, hardly support the view that no supplement is payable for children born after residence is transferred. Mr Laterza was a pensioner of Italian nationality who had worked in Belgium as a mine worker. He married and had children after returning to Italy. Once again, this did not prevent the Court from deciding that in such a situation a supplement was payable.

The questions contained in (3)

17. The questions in (3) concern all payments of child allowance made under the Bundeskindergeldgesetz to pensioners or to orphans who reside outside Germany, irrespective of whether it is payable solely under the German legislation (Article 77(2)(a) and Article 78(2)(a) of Regulation No 1408/71) or as a supplement in addition to an allowance paid under the legislation of another Member State (Article 77(2)(b) and Article 78(2)(b)). For the sake of the proper understanding of these questions, it is necessary to consider the provisions of the German legislation which make the amount of child allowance dependent upon the annual net income of the person concerned.

18. Under Paragraph 10, subparagraph 1, of the Bundeskindergeldgesetz, the child allowance for the first child is DM 50 a month, for the second DM 100 a month (from 1 July 1990: DM 130), for the third DM 220 a month and for the fourth and each subsequent child DM 240. Under

Paragraph 10, subparagraph 2, the child allowance for the second and each following child is progressively reduced, however, to a basic amount of DM 70 for the second and DM 140 for each subsequent child if the annual income of the person concerned and his or her spouse exceeds a specified amount by DM 480. The specified amount is DM 26 600 for a married person residing with his or her spouse and DM 19 000 for other persons, and these amounts are increased by DM 9 200 for each child in respect of whom child allowance is payable to the person concerned. [16]

Paragraph 11, subparagraph 1, of the Bundeskindergeldgesetz clarifies the meaning of the term 'annual income'. It is the sum of the income received in the previous calendar year to which the Einkommensteuergesetz (Income Tax Law) applies. Paragraph 11, subparagraph 2, of the Bundeskindergeldgesetz provides that a number of household expenses may be deducted from that amount, including income tax, social security contributions within limits laid down by tax legislation and allowances for the maintenance of certain persons, once again within limits laid down by tax legislation.

19. The national court wishes to establish whether the reduction of the child allowance provided for by the Bundeskindergeldgesetz if the income of the person concerned exceeds a specified amount can be applied even if the person concerned resides outside Germany and has income there. If so, it wishes to know how the child allowance must be calculated in so far as it depends upon annual income. In particular, it wishes to establish how the net income received in another Member State, that is to say after deduction of certain household expenses within the limits prescribed by tax law, must be quantified and taken into account for purposes of the reduction of the child allowance.

20. The observations made on these questions reveal a wide divergence of views. Thus the German Government considers that Article 12(2) of Regulation No 1408/71 is applicable. The first sentence of that provision reads as follows:

'The provisions of the legislation of a Member State for reduction ... in cases of overlapping with ... other income may be invoked even though ... such income arises in the territory of another Member State'.

This view put forward by the German Government does not seem to me to be compatible with the judgments of the Court. In particular, the Court ruled in *Bakker*[17] as regards Article 12 that

16 — It is not altogether clear to me to what extent this rule is also applicable to child allowance for orphans. Under Paragraph 24 of the Bundeskindergeldgesetz the child allowance for children alone (including orphans) is DM 50 a month and Paragraph 10 of the Bundeskindergeldgesetz is not applicable to that amount. In its question, however, the national court assumes that the amount of the allowance for orphans can also be reduced. Consequently, I shall consider the question in the light of both Article 77 (pensioners) and Article 78 (orphans) of Regulation No 1408/71.

17 — Judgment in Case 151/87 *Cornelis Bakker* v *Rijksdienst voor Werknemerspensioenen* [1988] ECR 2009.

'the anti-overlapping provisions referred to by that provision only concern cases where a single person is in receipt of more than one benefit' (paragraph 12).

and stated that Article 12

'forms the counterpart of the advantages which Community law affords workers in enabling them to require the social security legislation of more than one Member State to be applied simultaneously' (paragraph 13).

Paragraphs 10 and 11 of the Bundeskindergeldgesetz are not anti-overlapping provisions since child allowance is not thereby reduced by a benefit of the same kind which is already being received.

21. The Commission takes the view that the reduction of child allowance provided for by Paragraphs 10 and 11 of the Bundeskindergeldgesetz cannot be applied to a person entitled to child allowance who resides in a Member State other than Germany and has income there. This view is based on the consideration that these provisions of the Bundeskindergeldgesetz take into account annual income as defined in the German Einkommensteuergesetz. To apply these German tax rules to persons residing in other Member States would be tantamount to giving them extra-territorial application.

It is not necessary for me to evaluate the Commission's position since the national court assumes in its questions that the relevant provisions permit a reduction of child allowance on the basis of income received abroad and it is not for the Court to interpret those provisions. Consequently, I understand the questions as meaning that the national court wishes to establish whether Articles 77 and 78 of Regulation No 1408/71 also permit such a reduction and, if so, how this reduction is to be calculated without breaching Community law.

22. I consider that the questions in (3) must be answered on the basis of the principle of equal treatment. If the benefit for dependent children of pensioners or the benefit for orphans is reduced pursuant to the legislation of a Member State (in this case, Germany) by reference to the annual net income of the persons concerned who reside within the territory of that State, this reduction may also be applied to persons residing in another Member State in so far as they are not thereby placed at a disadvantage.

At the hearing, it was argued on behalf of some of the plaintiffs in the main proceedings contended that, in order to avoid difficulties of a practical nature, the competent German institution would systematically reduce the child allowance payable to persons residing abroad to the basic amount. Paragraph 11, subparagraph 3 of the Bundeskindergeldgesetz provides for such a reduction, in particular when the tax

assessment of the annual income to be taken into account has not yet been made.

If this administrative practice is actually applied, it seems to me to be contrary to the principle of equal treatment laid down by Regulation No 1408/71. The Court has consistently held that this principle

'prohibits not only overt discrimination based on nationality but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result'.[18]

To reduce child allowance systematically to the basic amount because the German authorities have not made the tax assessment seems to me to constitute a covert form of discrimination of this kind. This method discriminates against persons residing in another Member State, since they are not normally subject to German tax legislation.

23. Having said that, it is not in my view for the Court to decide how the German rules on reduction of child allowance must be applied to persons residing in another Member State who have acquired income there. In view of the principle of equal treatment, however, I would like to put forward one point. In calculating the child allowance for persons residing in another Member State, the German authorities may apply the reduction provided for in the German rules only on the basis of satisfactory evidence of the income acquired abroad and expenditure incurred there. The German tax provisions to which the Bundeskindergeldgesetz refers may then be applied to these facts by analogy.

In order to obtain the said evidence, the German authorities can naturally request the cooperation of the person concerned himself and, if possible, of the relevant foreign authorities. If such cooperation is refused by the person concerned, they may apply any penalties only in so far as these are applied in the same way as to persons residing in Germany who refuse to cooperate.

Questions contained in (4)

24. On 17 October 1985 the Administrative Commission on Social Security for Migrant Workers, provided for in Articles 80 and 81 of Regulation No 1408/71, adopted Decision No 129 concerning the application of Articles 77 and 78 of Regulation No 1408/71.[19] This decision contains a number of provisions intended, in line with the judgments of the Court, to determine the cases in which a supplement must be paid and to specify the procedures for the

18 — See in particular the judgment in Case 41/84 *Pietro Pinna* v *Caisse d'Allocations Familiales de la Savoie* [1986] ECR 1, paragraph 23.

19 — OJ 1986 C 141, p. 7.

determination of this supplement and the duties of the competent institutions.

As I understand it, the national court has asked the questions in (4) because it doubts whether Decision No 129 of the Administrative Commission contains rules capable of creating a right to a supplement.

The national court seems to overlook the fact that a decision of the Administrative Commission may only provide an aid to social security institutions responsible for applying Community law in this field but cannot impose on those institutions any obligations or confer any exemptions in connection with the application or interpretation of the Community rules.[20] *A fortiori* the Administrative Commission cannot create a right to a supplement. This right arises from Articles 77 and 78 of Regulation No 1408/71, as interpreted by the Court. I would not deny that the granting of such a supplement may still give rise to practical difficulties in respect of which the Administrative Commission could supply useful ancillary assistance. As the Court stated in *D'Amario* (paragraph 8), however, difficulties of a practical nature cannot constitute a reason for denying the person concerned the right to a supplement.

Conclusion

I propose that the Court should answer the questions as follows:

1. (a) Articles 77(2)(b)(i) and 78(2)(b)(i) of Council Regulation No 1408/71 of 14 June 1971, in the version contained in Annex I to Regulation No 2001/83 of 2 June 1983, must be interpreted as meaning that the right of a pensioner with one or more dependent children or of an orphan to a supplement — an amount equal to the difference between the allowance actually received under the legislation of the Member State of residence and the allowance payable under the legislation of another Member State — exists even if the legislation of the latter State subjects the payment of the allowance to the condition that the pensioner and his children or the orphan must reside in that State.

20 — Judgment in Case 98/80 *Giuseppe Romano* v *Institut National d'Assurance Maladie-Invalidité* [1981] ECR 1241.

(b) Article 77 of Regulation No 1408/71 is applicable to a part of the child allowance which, under the Bundeskindergeldgesetz, is payable to a person receiving a pension on account of an accident at work with one or more dependent children.

2. Article 77(2)(b)(i) of Regulation No 1408/71 must be interpreted as meaning that the abovementioned supplement must be paid by the State other than the State of residence

— if the right to a pension did not arise under the legislation of the other Member State until after the transfer of residence;

— in respect of children born after the transfer of residence.

3. Articles 77 and 78 of Regulation No 1408/71 must be interpreted as meaning that — if an allowance for the dependent children of a pensioner or for orphans is reduced under the legislation of a Member State by reference to the annual net income of persons who reside in the territory of that State — this reduction, by application of the principle of equal treatment, may also be applied on the basis of the annual net income, as determined on the basis of satisfactory evidence, of persons residing in another Member State.

4. The decisions of the Administrative Commission referred to in Articles 80 and 81 of Regulation No 1408/71 are merely an aid to social security institutions responsible for applying Community law in this field but cannot impose on those institutions any obligations or confer any exemptions in connection with the application or interpretation of the Community rules.