extinguish entitlement to higher orphans' benefits under the legislation of another Member State alone. Where the amount of the benefits actually received in the first Member State is less than that of the benefits provided for by the legislation of the other Member State alone, the orphan is entitled to a supplement from the competent institution of the latter State equal to the difference between the two amounts.

In Case 320/82

REFERENCE to the Court under Article 177 of the EEC Treaty by the Bundessozialgericht [Federal Social Court] for a preliminary ruling in the proceedings pending before that court between

BENITO D'AMARIO

and

LANDESVERSICHERUNGSANSTALT SCHWABEN [Regional Insurance Office, Swabia]

on the interpretation of Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416),

THE COURT (First Chamber)

composed of: T. Koopmans, President of Chamber, A. O'Keeffe and G. Bosco, Judges,

Advocate General: S. Rozès
Registrar: H. A. Rühl, Principal Administrator

gives the following

JUDGMENT

Facts and Issues

The order making the reference, the course of the procedure and the observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC may be summarized as follows:

I — Facts and written procedure

Benito d'Amario, the plaintiff in the main action, who has always resided in Italy, is the son of a migrant worker of Italian nationality. His father, who died in 1980, worked partly in the Federal Republic of Germany and partly in Italy. In the course of such work he completed insurance periods amounting in Germany to 83 months and in Italy to 111 months. After his return to Italy he continued to work until December 1974. From 1 March 1974 the Landesversicherungsanstalt Schwaben (hereinafter referred to as "the German institution"), the defendant in the main action, paid him a pension on the ground of incapacity for work on the basis of German legislation, whilst the Istituto Nazionale delle Previdenza Sociale [National Social Welfare Institution] (hereinafter referred to as "the Italian institution") also granted him from 1 March 1974 an Italian invalidity pension, together with family allowances for the plaintiff in accordance with Article 77 of Regulation No 1408/71.

After the death of the insured person the German institution paid his widow a widow's pension but refused to grant the plaintiff an orphan's pension, claiming that according to Article 78 of Regulation No 1408/71 that pension should be paid exclusively by the Italian institution because the insured person had completed a longer period of insurance in Italy than in the Federal Republic of Germany.

Article 78 of the said regulation, as amended by Regulation (EEC) No 2864/72 of the Council of 19 December 1972 (Official Journal, English Special Edition 1972 (31 December), p. 15), is worded as follows:

"Orphans

(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.

(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) . . .

(b) for the orphan of a deceased worker 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 . . . a right to one of the benefits referred to in paragraph (1) is acquired under the legislation of that State; . . .

(ii) in other cases in accordance with the legislation of the Member State to which the deceased worker had been subject for the longest period of time, provided

that ... the right to one of the benefits referred to in paragraph (1) is acquired under the legislation of that State ...

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."

The Italian institution paid the orphan's pension but the plaintiff wished to obtain a German pension, and when he brought an action before the Sozialgericht [Social Court] Augsburg to obtain one, it ruled in his favour. By judgment of 9 December 1981 the German institution was ordered to pay the plaintiff an orphan's pension for the period 1 February 1980 to 31 October 1981; the plaintiff was obliged to concede that the pension should be reduced by the amount he received from the Italian institution under Italian legislation.

When the case went before the Bundessozialgericht, the defendant contended that the Sozialgericht Augsburg had failed to comply with Article 78 (2) (b) (i) of Regulation No 1408/71. According to that provision benefits must be provided for an orphan only by the Member State in whose territory the orphan resides, provided that a right thereto has been acquired under the national legislation of that State. In adopting Article 78, and the subsequent articles, of that regulation the Community legislature intended to simplify the procedure for granting family allowances (including orphans' pensions) by confining responsibility for payment to one State only. It would be contrary to that intention, according to the defendant, to require payment of the difference between the German orphan's pension and the Italian pension. The plaintiff, however, argued that the application of Article 78 and the subsequent articles must not entail a loss of or a reduction in rights acquired on the basis of national insurance periods alone.

The Bundessozialgericht considered that the dispute raised problems concerning the interpretation of Community law and, by order of 6 October 1982, decided pursuant to Article 177 of the EEC Treaty to stay the proceedings until the Court of Justice had given a preliminary ruling on the following question:

"Must the German pension institution pay to an orphan who is an Italian national and has always lived in Italy a supplement to the orphan's pension granted to him by the Italian pension institution if, although his late father paid contributions to both the German and the Italian pension institutions, entitlement to the grant of an orphan's pension was acquired under German legislation by virtue of the German contributions alone?"

In the grounds for the order making the reference the Bundessozialgericht finds that the insured worker was already in receipt of a family allowance for the plaintiff from the Italian institution. According to the last sentence of Article 78 (2) of Regulation No 1408/71, the Italian legislation remains applicable after the death of the insured worker. The wording and general structure of Article 77 *et seq.* of that regulation likewise support the view that only one Member State is responsible for payment of an orphan's pension in accordance with its national legislation. Nevertheless, in its judgment of 9 July 1980 (*Gravina*, Case 807/79 [1980] ECR 2205) the Court considered that supplementary benefits should be granted in addition to an orphan's pension where national legislation alone provided a right to a

greater amount than that available under the legislation of the Member State responsible for payment of the benefit under Article 77 *et seq.* of Regulation No 1408/71.

The court making the reference states that it is in doubt as to whether the principles laid down in the above-mentioned judgment are applicable to this case, where the circumstances may require a different approach, namely the application of Italian legislation alone to the exclusion of any right arising under German legislation. Those circumstances may be summarized as follows:

(a) The Community legislature's declared aim of achieving a simple and quick administrative procedure would be imperilled by effecting a division of rights which entails administrative complications.

(b) Although, according to the judgment in Case 807/79, a supplement must be granted solely on the basis of the pension calculated in accordance with national legislation, that cannot be done here on the basis of the national provisions alone because German internal law does not allow for such a supplement.

(c) In Case 807/79 the orphans were already in receipt of an orphan's pension under German legislation, whereas that is not so in the present case.

(d) The plaintiff in the main action has never resided in the Federal Republic of Germany.

The order making the reference was recorded at the Court Registry on 16 December 1982.

Pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC written observations were lodged by the Landesversicherungsanstalt Schwaben, the defendant in the main action, represented in this matter by its director, Mr Wanders; by the Government of the Italian Republic, represented by the Avvocato dello Stato [State Advocate General] Pier Giorgio Ferri; and by the Commission of the European Communities, represented by Manfred Beschel, a member of its Legal Department.

On hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court decided to open the oral procedure without any preliminary inquiry.

By order of 4 May 1983 the Court decided pursuant to Article 95 (1) of the Rules of Procedure to assign the case to the First Chamber.

II — Summary of the written observations lodged with the Court

A — Observations of the defendant in the main action

The *defendant in the main action* states that this reference for a preliminary ruling is necessary in order to establish how far the requirements laid down by the Court in Case 807/79 ([1980] ECR 2205) are relevant to the case in hand. By way of a preliminary remark, it states that the German institutions concerned consider that the judgment in that case established the following requirements:

(a) Transfer of residence from the territory of one Member State to the territory of another Member State requires the institution of the new State of residence to pay benefits.

(b) The requirement that the institution of the new State of residence should pay benefits does not, however,

deprive the recipient of the right to higher benefits under the legislation of the State where he resided previously.

(c) If the amount which the new State of residence must pay is less than the amount of the benefit payable under the legislation of the State of previous residence alone the institution of the latter State must bear the cost of paying a supplement equal to the difference between the two amounts.

In the light of that, the defendant relies essentially on two arguments to support its submission that the answer to the question submitted by the national court should be in the negative.

First, it observes that the facts in Case 807/79 differ in one essential respect from those of the present case. The applicants in Case 807/79 were entitled to an orphan's pension on the basis of their residence in the Federal Republic of Germany and were actually drawing the benefit, whereas in this case such a pension has never been paid by a German institution and the plaintiff in the main action has never at any time lived in the Federal Republic of Germany. The defendant adds that, if regard is had to the judgments which the Court has hitherto given in similar cases, it will be observed that the matter has always been decided on the basis of actual receipt of a family allowance before the transfer of residence. It goes on to maintain that since the plaintiff in the main action has always resided in Italy he has acquired through the death of the insured person only a right to a pension payable by the Italian insurance institution. That is made clear by Article 78 (2) of Regulation No 1408/71. To put the matter briefly, rights enforceable equally against the German insurance institution would be present only if the plaintiff had been living in the Federal Republic of Germany when the insured person died.

Secondly, the defendant claims that Article 78 of Regulation No 1408/71 is a rule concerning choice of law the objective of which is to create a right as against the institution of the State of residence. The award of a supplement equal to the difference between the Italian and the German orphan's pension is thus clearly at variance with the intention of the Community legislature of invariably fixing family allowances solely on the basis of the legislation of the State of residence and of allowing exceptions only in cases where the legislation of the State of residence does not confer a right to benefits. Furthermore, since the amount of each of the national family allowances is inseparably bound up with the relevant costs in each Member State it would not be logical to compel the Member States to award their benefits regardless of the place of residence. Furthermore, such a requirement would encourage the opposite of integration between the Member States as far as social policy is concerned. Since harmonization between social security systems is desired it is appropriate to accord more importance to Member States' willingness to recognize national insurance periods reciprocally than to the objective of harmonizing, merely as to their amount, the various benefits in the Member States.

B — Observations of the Italian Government

According to the *Italian Government* the judgment of the Court in Case 807/79 has confirmed yet again that the objective of Article 51 of the EEC Treaty will not be attained if, as a result of exercising their right of free movement, workers must forfeit the social security advantages accruing to them solely under the legislation of one Member State. Consequently, the Community provisions may not be applied in such a way as to deprive a migrant worker or those entitled under him of benefits accruing independently from the legislation of a Member State. The general objectives of Regulation No 1408/71 are also directed to ensuring that the migrant worker obtains the highest benefit to which he is entitled by virtue of the periods of insurance completed in the various Member States.

If the interpretation of Article 78 of the above-mentioned regulation abides by those principles the answer to be given to the question submitted by the court making the reference cannot differ from that already provided in Case 807/79. The fact that in the present case it is only the insured worker who moved is unimportant. In fact the benefit in question forms part of a number of advantages arising from the worker's insured status which he must be able to retain for himself and for the members of his family when he moves within the Community.

In conclusion, the Italian Government suggests that the reply to the question submitted should be in the affirmative.

C — Observations of the Commission

The *Commission of the European Communities* points out first of all that the question referred for a preliminary ruling does not expressly mention the provisions of Community law of which an interpretation is requested. In the grounds of its order the court making the reference referred in a general fashion to Article 77 *et seq.* of Regulation No 1408/71, whereas the defendant clearly considers that it is the scope of Article 78 (2) (b) (i) of the regulation which requires an interpretation. In the opinion of the Commission, however, the question can only concern the interpretation of the last sentence of Article 78 (2), read in conjunction with Article 77 of Regulation No 1408/71. Before his death the plaintiff's father received from the Italian institution the family allowances referred to in Article 77. In those circumstances the last sentence of Article 78 applies to this case.

The Commission observes next that the death of the insured person, as the court making the reference has pointed out, entitled his son at the same time to an orphan's pension solely on the basis of German law. Relying on the general principles laid down by the Court of Justice in this sphere, the Commission considers that although the plaintiff cannot claim the benefits to which he is entitled under German law up to the amount of the benefits granted under Italian law, the difference between the two must nevertheless be paid by the German insurance institution. It therefore proposes that the problem

should be resolved by setting off the "competing" benefits of the Member States concerned.

The Commission does not deny that that solution may give rise to administrative difficulties. However, such difficulties cannot be overcome simply by reducing the existing rights. Such a reduction would be contrary to the aim of Article 51 of the EEC Treaty, which is to ensure that in all cases the migrant worker obtains the most extensive right to which he is entitled under the legislation of one of the Member States. Articles 77 and 78 of Regulation No 1408/71 likewise, by their nature, do not support a reduction in acquired rights. The fact that legal writers classify a provision of Community law as a rule of choice of laws is of no importance. Only the legal effect of a provision of Community law is relevant. The Commission considers that, regardless of its legal classification, no rule of Community law may have the effect of reducing rights acquired on the basis of the legislation of one State alone.

The Commission then observes that the residence of the plaintiff cannot be significant inasmuch as German legislation itself does not attach any relevance to it. It adds that if the plaintiff's father had remained in Germany family allowances would have been granted to him on the basis of Article 77 of Regulation No 1408/71 in respect of his son who was living in Italy. If he had died in Germany the German insurance institution would then have been obliged to grant his son an orphan's pension pursuant to the last sentence of Article 78 (2) of the said regulation regardless of the fact that the son of the insured person had never lived in Germany. In this connection the Commission points out that in Case 733/79 *(Caisse de Compensation des Allocations Familiales des Régions de Charleroi et de Namur* v *Laterza* [1980] ECR 1915) the children for whom the family allowances were granted under Belgian legislation had never lived in Belgium. Moreover, it is not unusual for the children of migrant workers to remain in their country of origin.

Finally, the Commission maintains that if the plaintiff could rely only on his right under Italian law he would be placed in a less favourable position than an orphan whose father never exercised his right of free movement, always remained in Germany and completed in that country the same periods of insurance as the plaintiff's father.

For those reasons, the Commission suggests that the reply to the question submitted by the Bundessozialgericht should be as follows:

"The last sentence of Article 78 (2), read in conjunction with Article 77, of Regulation No 1408/71 of the Council of 14 June 1971 must be interpreted as meaning that the right to benefits payable by the competent State in accordance with those provisions does not extinguish the right to higher benefits acquired solely under the legislation of another Member State. If the actual amount of the benefits in the first Member State is smaller than the amount of the benefits provided for solely by the legislation of the other Member State an orphan may claim from the competent insurance institution in the latter Member State a supplement corresponding to the difference between the two amounts."

III — Oral procedure

At the sitting on 14 July 1983 the plaintiff in the main action, represented

by Jürgen Stahlberg, Rechtsanwalt, Munich, the defendant in the main action, represented by Mr Wanders, Director of the Landesversicherungsanstalt Schwaben and the Commission of the European Communities, represented by Manfred Beschel, a member of its Legal Department, presented oral argument.

At the sitting the Commission emphasized that the solution put forward in its written observations would not lead to insurmountable difficulties from the administrative point of view. In that respect, it referred to the decision of the Administrative Commission on Social Security for Migrant Workers of 20 April 1983 (Official Journal, C 295, 2. 11. 1983, p. 4) which sets out the procedures to be followed and fixes the detailed rules for cooperation between the competent institutions, as derived from the solutions adopted by the Court in its judgments in Cases 100/78 *(Rossi)*, 733/79 *(Laterza)* and 807/79 *(Gravina)*.

The Advocate General delivered her opinion at the sitting on 27 October 1983.

Decision

1 By order of 6 October 1982, received at the Court on 16 December 1982, the Bundessozialgericht [Federal Social Court] referred to the Court for a preliminary ruling, pursuant to Article 177 of the EEC Treaty, a question on the interpretation of Articles 77 and 78 of Regulation (EEC) No 1408/71 of the Council of 14 June 1971, on the application of social security schemes to employed persons and their families moving within the Community (Official Journal, English Special Edition 1971 (II), p. 416).

2 That question is worded as follows:

"Must the German pension institution pay to an orphan who is an Italian national and has always lived in Italy a supplement to the orphan's pension granted to him by the Italian pension institution if, although his late father paid contributions to both the German and the Italian pension institutions, entitlement to the grant of an orphan's pension was acquired under German legislation by virtue of the German contributions alone?"

3 By that question, the national court seeks to establish whether, when the deceased father has been subject to the legislation of several Member States, entitlement to an orphan's pension is exclusively determined by the

legislation of the Member State which is competent to grant that benefit in accordance with Articles 77 and 78 of Regulation No 1408/71 (in this instance Italy), or whether, on the other hand, the institution of another Member State, whose legislation alone provides for an entitlement to a higher pension (in this case the Federal Republic of Germany) is required to grant a supplement corresponding to the difference between the two amounts.

4 In its judgment of 9 June 1980 (Case 807/79 *Gravina* [1980] ECR 2205), the Court noted that the aim of Article 51 of the Treaty 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. Consequently the Community rules on social security cannot, 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 dependants of benefits granted under the legislation of a single Member State.

5 It follows from the above-mentioned judgment that Article 78 of Regulation No 1408/71 may not be interpreted in such a way as to deprive the orphans of a deceased worker who has been subject to the legislation of more than one Member State of the benefits acquired under the legislation of a single Member State if they are higher than the benefits granted by the Member State to whose territory the orphans' residence has been transferred.

6 The Bundessozialgericht hesitates to apply that interpretation to the case brought before it. It states that this case does not concern an orphan whose residence has been transferred inasmuch as the plaintiff in the main action has always resided in Italy where his father was subject to the social security scheme before going to work in the Federal Republic of Germany and where the family allowances were granted by the Italian institution in accordance with Article 77 of Regulation No 1408/71. In addition the Bundessozialgericht points out that the application of the Italian scheme alone to the exclusion of any benefit granted under the German legislation, seems, in its view, to conform to the declared aim of the Community legislature, which is to achieve a quick and simple administrative procedure.

7 In the first place it should be noted that the question whether the residence of an orphan has always been established in a 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. Indeed, as the Court has already observed, in relation to family allowances, in its judgment of 12 June 1980 (Case 733/79 *Laterza* [1980] ECR 1915), the guiding principles of that regulation require that, if the amount of the benefits provided by the State of residence is less than that of the benefits awarded by the other State responsible for paying them the worker or his dependant shall continue to be entitled to the greater amount and shall receive from the competent institution of that latter State a supplement to the benefit equal to the difference between the two amounts.

8 Though it is true that the concurrent grant of benefits from different Member States may, in the case of orphans' benefits, give rise to difficulties of a practical nature which, as yet, have not been envisaged by the Community provisions concerning the application of Regulation No 1408/71, that fact cannot, in itself, justify an interpretation of that regulation according to which the application of the legislation of a Member State prevents the payment of more favourable benefits due under the legislation of another Member State alone.

9 It follows that the circumstances and considerations referred to by the national court are not such as to justify a departure from the case-law concerning the interpretation of Article 51 of the Treaty and Regulation No 1408/71.

10 In those circumstances, in reply to the question submitted it should be stated that Articles 77 and 78 of Regulation No 1408/71 must be interpreted as meaning that, where a deceased father has been subject to the legislation of more than one Member State, entitlement to an orphan's pension acquired under the legislation of the Member State which is competent according to those provisions does not extinguish entitlement to higher orphans' benefits under the legislation of another Member State alone. Where the amount of the benefits actually received in the first Member State is less than that of the benefits provided for by the legislation of the other Member State alone, the orphan is entitled to a supplement from the competent institution of the latter State equal to the difference between the two amounts.

Costs

11 The costs incurred by the Italian Government and by the Commission of the European Communities, which have submitted observations to the Court, are not recoverable. As these proceedings are, in so far as the parties to the main action are concerned, in the nature of a step in the proceedings pending before the national court, the decision on costs is a matter for that court.

On those grounds,

THE COURT (First Chamber)

in answer to the question referred to it by the Bundessozialgericht, by order of 6 October 1982, hereby rules:

Articles 77 and 78 of Regulation No 1408/71 must be interpreted as meaning that, where a deceased father has been subject to the legislation of more than one Member State, entitlement to an orphan's pension acquired under the legislation of the Member State which is competent according to those provisions does not extinguish entitlement to higher orphans' benefits under the legislation of another Member State alone. Where the amount of the benefits actually received in the first Member State is less than that of the benefits provided for by the legislation of the other Member State alone, the orphan is entitled to a supplement from the competent institution of the latter State equal to the difference between the two amounts.

Koopmans O'Keeffe Bosco

Delivered in open court in Luxembourg on 24 November 1983.

For the Registrar

H. A. Rühl

Principal Administrator

T. Koopmans

President of the First Chamber